93-137

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JACKEY B. GRIFFITHS
Petitioner

v.

CIGNA CORPORATION and MARLENE GRAHAM
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In the context of a claim of unlawful retaliation in violation of Section 704(a) of the Civil Rights Act of 1964 and Section 955(d) of the Pennsylvania Human Relations Act, did the panel of the United States Court of Appeals for the Third Circuit in this case improperly heighten plaintiff's burden of proof, so as to require that the improper factor be the "sole cause," effectively disregarding the well-established law of that Circuit, other Circuit Courts of Appeal, and this Court that the employee need only establish that retaliatory animus actually played a role in the improper action of the employer and had a determinative influence on the outcome of the employers' decision-making process?

2. Was the majority decision of the panel which improperly ignored long-established and controlling Pennsylvania authority regarding the common law tort of malicious prosecution and the element of "initiation," in direct

conflict with an important principle of Pennsylvania law so as to require this Court's power of supervision?

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OPINIONS BELOW

Based upon Special Interrogatories answered by a jury, on March 18, 1992 the United States District Court for the Eastern District of Pennsylvania, by the Honorable Donald W. VanArtsdalen, entered judgment in favor of Jackey Griffiths and against CIGNA Corporation ["CIGNA"] and Marlene Graham ["Graham"] in the total amount of $377,500. See Judgment Order of Judge VanArtsdalen, Appendix [App.] at A-1. On May 13, 1992, the district court denied all post-trial motions filed by CIGNA and Graham on the basis of its detailed ruling from the bench following oral argument. See Transcript of the court's ruling, App. at A-2.

On March 17, 1993, a divided panel of the U.S. Court of Appeals for the Third Circuit reversed the denial of the post-trial motions filed by CIGNA and Graham, vacated the jury's verdict on the issue of malicious prosecution, and remanded the case for a new trial on the retaliation claims brought pursuant to state and federal anti-discrimination

statutes. See Decision and Judgment Order, App. at A-17. That decision is also officially reported at 988 F.2d 457 (3d Cir. 1993).

STATEMENT OF JURISDICTION

On March 17, 1993, the United States Court of Appeals for the Third Circuit reversed the judgment of the United States District Court for the Eastern District of Pennsylvania entered on March 18, 1992 and remanded the case to the district court for the entry of a judgment in favor of CIGNA and Graham on Jackey Griffiths' malicious prosecution claims and for a new trial on his claim of retaliation under applicable state and federal anti-discrimination statutes. App. at A-19.

A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by Jackey Griffiths and denied by the Circuit Court on April 14, 1993. App. at A-60.

Pursuant to the provisions of 28 U.S.C. §1254(1), this Court has jurisdiction to review the final decision of the United States Court of Appeals for the Third Circuit. The decision of that Court is in conflict with its own prior decisions, the decisions of several other circuit courts of appeal, and the applicable decisions of this Court, and is in direct conflict with

an important principle of Pennsylvania law so as to require this Court's power of supervision. In accordance with the provisions of Rule 10 of the Rules of this Court, the final decision of the Third Circuit should be considered for review on the present Writ of Certiorari.

STATUTORY AUTHORITIES

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a):

> **Discrimination for making charges, testifying, assisting or participating in enforcement proceedings.** It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C.S. §§2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C.S. §§2000e-2000e-17].

The Pennsylvania Human Relations Act, 43 P.S. §955(d):

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation,

or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

* * *

> (d) For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On April 11, 1991, petitioner herein and plaintiff below, Jackey B. Griffiths, brought the present action against his former employer, CIGNA Corporation ["CIGNA"] and his immediate supervisor, Marlene Graham ["Graham"], based on their instigation of false criminal charges, his resulting incarceration, and the termination of his employment, all in retaliation for his filing of a complaint of national origin discrimination with the Equal Employment Opportunity Commission. Jurisdiction was conferred in the United States District Court for the Eastern District of Pennsylvania by the provisions of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. §1331, both of which provide for original jurisdiction over plaintiff's claims arising under the laws of the United States and over actions to recover damages and to secure equitable and other relief. Jurisdiction over Jackey

Griffiths' state law claims was conferred in the United States District Court for the Eastern District of Pennsylvania pursuant to that Court's supplemental jurisdiction as codified in 28 U.S.C. §1367.

At the trial, which began on March 10, 1992, the district court submitted to a jury Jackey Griffiths' claims relating to unlawful retaliation in violation of Section 704(a) of the Civil Rights Act of 1964 and Section 5(d) of the Pennsylvania Human Relations Act, and his claim for malicious prosecution under controlling state law. On March 17, 1992, in response to Special Interrogatories, the jury found that CIGNA and Graham did initiate criminal proceedings against Jackey Griffiths to retaliate against him because he had filed a charge of employment discrimination against CIGNA (Interrogatory #2) and did terminate him for the same reason (Interrogatory #1). The jury further found that CIGNA and Graham *reasonably could not have had* and, in fact, *did not have* an honest, good faith belief that Jackey Griffiths stole CIGNA

computer equipment when they provided information to the Philadelphia police (Interrogatories #8 and #3, respectively), and that CIGNA and Graham acted maliciously when they instituted criminal proceedings against him (Interrogatory #4). In addition, the jury determined that CIGNA and Graham failed to supply the Philadelphia Police Department with the significant facts they knew or should have known upon reasonable investigation would be necessary to the police investigation (Interrogatory #7).

The jury awarded compensatory damages for the retaliatory discharge in the amount of $50,000 (Interrogatory #1a), and $27,500 in compensatory damages arising from the malicious prosecution claim (Interrogatory #9). The jury also awarded punitive damages against CIGNA for retaliatory discharge ($100,000) and punitive damages against CIGNA ($150,000) and against Graham ($50,000) for the malicious prosecution of Jackey Griffiths (Interrogatory #15). Based on the special findings of the jury, judgment was entered on March

18, 1992 against CIGNA and Graham in the amount of $77,500 in compensatory damages, and $250,000 against CIGNA and $50,000 against Graham in punitive damages.

CIGNA and Graham then filed a timely request for a new trial and/or an amendment to the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure. On May 14, 1992, the district court denied all post-trial motions on the basis of its detailed ruling from the bench following oral argument the day before. CIGNA and Graham then filed an appeal to the United States Court of Appeals for the Third Circuit.

On March 17, 1993, a divided panel of the Court of Appeals for the Third Circuit reversed the denial of the post-trial motions, vacating the jury's verdict on the issue of malicious prosecution and remanding the case for a new trial on the retaliation claims. In doing so, the panel improperly ignored principles established by the Pennsylvania Supreme Court regarding the elements of a malicious prosecution claim and disregarded its own and this Court's pronouncements

relating to plaintiff's burden of proof in "pretext" retaliation claims brought pursuant to Section 704(a) of the Civil Rights Act of 1964 and Section 955(d) of the Pennsylvania Human Relations Act.

On the retaliation issue, the panel, by Judge Greenberg, blatantly ignored longstanding principles concerning the plaintiff's burden of proof in pretext cases and held that the discriminatory motive must be the "sole cause" for the employer's action. Opinion at p. 32 [App. at A-50]. The panel based this decision on what they characterized as an inconsistency within the Third Circuit regarding the standard for a "but for" determination, and on this Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) which they found to clarify that standard. To reach its final conclusion, the panel adopted a convoluted interpretation of this Court's Price Waterhouse decision resolving that, in mixed motive cases, a plaintiff is required to prove that the discriminatory animus was a "determinative factor," while in pretext cases, the

plaintiff must show that all of an employer's stated reasons for its actions were a sham and the discriminatory reason was the *sole* reason for the employer's actions.

On the malicious prosecution issue, the majority of the panel ignored the mandates of the Pennsylvania Supreme Court in Simpson v. Montgomery Ward & Company, 354 Pa. 87, 46 A.2d 674 (1946) and constructed a new definition for "initiation" as it relates to a defendants' actions in the criminal law accusation process. Opinion at p. 13 [App. at A-31]. The majority based its holding on the erroneous belief that the Pennsylvania Supreme Court had not ruled in a situation where a private person merely supplied information to the police.[1]

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[1] Judge Seitz, in a well-reasoned dissenting opinion on this issue, also failed to cite the holding of the Simpson opinion but correctly disagreed with the majority's "prophecy as to the controlling principle of Pennsylvania law." Judge Seitz proffered that when a private defendant deliberately withholds material facts when providing information about the possible criminal activity of a known individual, the private defendant's actions amount to knowingly supplying false information and therefore, the defendant can be held to have initiated the prosecution.

It is respectfully suggested that the opinions and final resolution of the panel of the Third Circuit are contrary to the controlling decisions of the United States Court of Appeals for the Third Circuit, conflict with decisions of other circuits, and are contrary to the rulings of the Supreme Court of the United States. It is also averred that the panel's decision is in egregious conflict with longstanding principles of state law and will have implication beyond that state's boundaries. Accordingly, the imposition of this Court's power of supervision is required and the panel's decision requires reconsideration and reversal to avoid manifest injustice.

The questions raised by this Petition require consideration by this Court to secure and maintain uniformity of decisions in this Court and in the Circuit Courts of Appeal and involve issues of exceptional importance, to wit:

1. In the context of a claim of unlawful retaliation in violation of Section 704(a) of the Civil Rights Act of 1964 and Section 955(d) of the Pennsylvania Human Relations Act,

did the panel of the United States Court of Appeals for the Third Circuit in this case improperly heighten plaintiff's burden of proof, so as to require that the improper factor be the "sole cause," effectively disregarding the well-established law of that Circuit, other Circuit Courts of Appeal, and this Court that the employee need only establish that retaliatory animus actually played a role in the improper action of the employer and had a determinative influence on the outcome of the employers' decision-making process? Hazen Paper Company v. Biggins, ___ U.S. ___, 113 S.Ct. 1701, 61 USLW 4323 (1993); Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Ostrowski v. Atlantic Mutual Ins. Co., 968 F.2d 171 (2d Cir. 1992); Chappell v. GTE Products Corp., 803 F.2d 261 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298 (7th Cir. 1990); Williams v. Valentec Kisco, Inc., 964 F.2d 723 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 635 (1992).

2. Was the majority decision of the panel, which improperly ignored a long-established and controlling Pennsylvania authority regarding the common law tort of malicious prosecution and the element of "initiation," in direct conflict with an important principle of Pennsylvania law so as to require this Court's power of supervision?

II. STATEMENT OF THE FACTS

Jackey B. Griffiths was born and educated in Jamaica, where he was a policeman for seven years. He first was employed as a security officer at CIGNA Corporation on January 2, 1985, and was promoted to Assistant Shift Supervisor in November, 1987. During his employment with CIGNA, derogatory remarks were made about his Jamaican background by other security officers including references to Jamaicans as "drug dealers." These actions caused him stress and anger, and further caused him to believe he was being discriminated against because he was a black man from

Jamaica.

In February, 1990, Jackey Griffiths applied for one of the posted openings for the position of Shift Supervisor. Because the promotion went to a less experienced, less highly evaluated native-born employee who had, in fact, been reported by him for sleeping on the job at an earlier date, Jackey Griffiths reached the conclusion that he had been discriminated against on the basis of his national origin. Consequently, he went to the Equal Employment Opportunity Commission on March 7, 1990, where he was interviewed preparatory to the filing of a charge of discrimination. On March 12, 1990, after he was advised that the promotion decision was final, he became so upset and physically ill that he was required to excuse himself from work in the middle of his shift. He returned to the EEOC the following morning and filed a formal Charge against CIGNA and Marlene Graham, the head of Security, averring that he was denied a promotion based on his national origin. The EEOC Charge was mailed to CIGNA on

March 16, 1990.

As further background to the ensuing improper actions of both CIGNA and Graham, it must be noted that beginning several months before Jackey Griffiths was transferred to the third shift (10:25 p.m. to 6:25 a.m.) in November, 1989, a large number of computers had been stolen from the CIGNA facility where he was employed. On or after March 20, 1990 (just four (4) days after service of plaintiff's discrimination charge), Graham, head of CIGNA Security, advised the Philadelphia Police in a three page report that "[i]nformation gathered concerning the latest thefts suggests that Assistant Supervisor Jackey Griffiths working in conjunction with a former CIGNA security officer Tony Bolton may be responsible for some if not all of the computer thefts." Most notably omitted from her report was that others in the department and *not* Jackey Griffiths or Tony Bolton had been previously suspected of the thefts, that other employees had access to the locked areas where the stolen computers were stored, and that many avenues

existed by which the computers could leave the building without the involvement or complicity of security guards. Graham had in fact suspected another supervisor on an earlier shift of having been involved in computer thefts over the previous several months, and that employee was in the building on the evening of March 12, 1990.

The police made no independent investigation of Graham's allegations, but relied totally on documents and information supplied by her.

On April 13, 1990, Jackey Griffiths was notified that he was wanted by the police. He surrendered and was placed in jail. At a preliminary hearing on April 23, 1990, at which Marlene Graham and another CIGNA witness testified, all charges against Jackey Griffiths were dismissed because of lack of evidence to support them.

A few days later, he was notified by Graham that if he did not come in to be questioned about the computer thefts, he would be terminated. He complied with the directive to speak

to an investigator in CIGNA's Corporate Audit Department, advising her, that because he had been criminally charged once at CIGNA's instigation, he would need to have his attorney present during any questioning. He gave CIGNA the name and phone number of his attorneys, but neither they nor Griffiths were ever notified that CIGNA wanted him to report for questioning. Nor was any further investigation of the computer thefts undertaken. Eleven days after the charges against him were dismissed at the preliminary hearing, Jackey Griffiths was terminated from his employment at CIGNA, allegedly because of his failure to fully cooperate in an investigation which actually was never continued after his discharge.

ARGUMENT

I. THE PANEL IMPROPERLY OVERRULED LONG-ESTABLISHED LAW CONTROLLING A PLAINTIFF'S BURDEN OF PROOF IN EMPLOYMENT DISCRIMINATION AND RETALIATION CLAIMS.

Count II of the Complaint bottoming the present action set forth claims based on unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3, effected after Jackey Griffiths filed a charge of discrimination based on his national origin (Jamaican) with the Equal Employment Opportunity Commission on March 7, 1990 (signed and notarized 3/12/90; mailed to defendant 3/16/90). It was alleged that CIGNA and Graham retaliated against him after he had filed that administrative complaint by unlawfully causing him to be charged with a felony, arrested, prosecuted, and imprisoned, and after the appropriate dismissal of those charges, by terminating him from his employment. Count IV of the Complaint reiterated those allegations as they

apply under the Pennsylvania Human Relations Act, 43 P.S. §955(d).

In order to prove a claim of retaliatory discharge under both Title VII and the PHRA, the burden is upon the employee to establish by a preponderance of the evidence that the employee filed charges to enforce his rights under these statutes, that the employer was made aware of these charges, and that the employee was fired or other action taken as a result. Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990). See also Consumers Motor Mart v. Human Relations Commission, 108 Pa.Cmwlth. 59, 529 A.2d 571 (1981). Therefore, an employee establishes a retaliation claim if he shows that he had a reasonable belief that his employer was engaged in an unlawful employment practice and that the employer retaliated against him for protesting against that practice.[2] See, e.g., Hicks v. ABT

[2] In order to prove his claim of retaliation under state or federal law, it is not necessary that an employee prove that the employer in fact discriminated against him due to a protected trait. Employers

Assoc., Inc., 572 F.2d 960, 967-69 (3d Cir. 1978); Miller v. Yellow Freight Systems, Inc., 758 F.Supp. 1074 (W.D.Pa. 1991), *aff'd*, 941 F.2d 1202 (3d Cir. 1991). *See also* Jennings v. Tinley Park Common. Consol. School Dist., 796 F.2d 962, 967 (7th Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987); EEOC v. Crown Zellerback Corp., 720 F.2d 1008, 1013 (9th Cir. 1983). In order to satisfy the third prong of the retaliatory standard, "[t]he causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982).

Once the employee has met this burden of establishing

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are liable to an employee if they retaliated against him even if the underlying charges were determined to be unfounded. All that is required is the employee's good faith belief at the time he filed the charge. Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989), *reh. denied*, 871 F.2d 122 (11th Cir. 1989); Manoharan v. Columbia University College of Physicians and Surgeons, 842 F.2d 590 (2d Cir. 1988); Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Love v. RE/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984).

a prima facie case (which "is not onerous"), the defendant employer must then "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981). The employer's task is merely to *articulate* (not *prove*), via admissible evidence, a legitimate reason for the employment decision. At that point, the employee must have the opportunity to demonstrate that the employer's proffered reason was not the "true reason" for the employment decision. *Id.* at 256; McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973). This may be done either by persuading the trier of fact that a discriminatory reason more likely than not motivated the employer, or by persuading the trier of fact that the employer's proffered explanation is unworthy of belief. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256; McDonnell Douglas v. Green, 411 U.S. at 805.

As to the ultimate burden of proof, prior to its decision

in the present case, the Third Circuit Court of Appeals clearly and consistently stated that an employee must show that his membership in a protected class or the protected activity in which he engaged was the "determining" (or "determinative") factor, the "but for" reason for the adverse employment action. Bellissimo v. Westinghouse Elec. Corp., *supra*; Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984); Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980). *See also*, Billet v. CIGNA Corp., 940 F.2d 812 (3d Cir. 1991); Bruno v. W. B. Saunders Co., 882 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); Roebuck v. Drexel University, 852 F.2d 715 (3d Cir. 1988). Neither the Third Circuit nor any other court had ever previously required that the illegal motive was the "only" or "sole" reason for the employer's action. Bellissimo v. Westinghouse Elec. Corp., *supra;* Lewis v. University of Pittsburgh, *supra;* Smithers v. Bailar, *supra. See also* Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir. 1992); Bruno v. W. B. Saunders, 882 F.2d

at 764; Chippollini v. Spencer Gifts Inc., 814 F.2d 893, 897 (3d Cir. 1987), *cert. dismissed,* 483 U.S. 1052 (1987).

> The "but for" test does not require a plaintiff to prove that the discriminatory reason was *the* determinative factor, but only that it was *a* determinative factor. See, Smithers v. Bailar, 629 F.2d 892, 898 (3d Cir. 1980)("a plaintiff need not prove that [the discriminatory reason] was the employer's sole or exclusive consideration, but . . . he must prove that [the discriminatory reason] made a difference in deciding the promotion, retention, or discharge"). Interpreting Title VII to require proof of "the determinative factor" is inconsistent with the "but for" causation test, insofar as plaintiff would be required to show that the discriminatory motive was the *sole* reason for the action taken. More than the "but for" cause can contribute to an employment decision, and if any one of those determinative factors is discriminatory, Title VII has been violated. See Lewis v. University of Pittsburgh, 725 F.2d at 917 n. 8. On two occasions this Court has upheld jury instructions using the term "the determinative factor," but in both instances the Court concluded that in context the use of the definite article did not imply a "sole determinative factor" standard. See, Lewis v. University of Pittsburgh, 725 F.2d at 916-18; Smithers v. Bailar, 629 F.2d at 896-98 ("appellate court reviews the charge as a whole, preserving context"). (Emphasis in original).

Bellissimo v. Westinghouse Elec. Corp., 764 F.2d at 179 n. 1.

In a confusing melange of "mixed motive" and "pretext" analyses, the panel in the present case, without the requisite submission to the Court *en banc*[3], overruled the entire body of precedent controlling plaintiff's burden of proof in pretext cases and held that discrimination must be the sole cause of the employment action in pretext cases. (Opinion, p. 32, App. at A-50). This holding is not, as claimed, supported in, or a logical corollary of, this Court's decision in Price Waterhouse v. Hopkins, *supra.* Nor does it have any support in any of the decisions of other Circuit Courts of Appeals rendered before or after Price Waterhouse v. Hopkins, *supra. See, e.g.,* **First Circuit:** Loeb v. Textron, Inc., *supra;* **Second Circuit:** Ostrowski v. Atlantic Mutual Ins. Co., *supra;* Hagelthorn v.

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[3] See Chapter 9 of the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit:

> **9.1 Policy of Avoiding Intra-Circuit Conflict of Precedent. (Formerly IOP 8.C)** It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court in banc consideration is required to do so.

Kennecott Corp., 710 F.2d 76 (2d Cir. 1983); **Fifth Circuit:** Boddie v. City of Columbus, Miss., 989 F.2d 745 (5th Cir. 1993); **Sixth Circuit:** Chappell v. GTE Products Corp., 803 F.2d at 268; (6th Cir. 1986); Wilkins v. Eaton Corp., 790 F.2d 515 (6th Cir. 1986), *reh. denied*, 797 F.2d 342 (6th Cir. 1986); **Seventh Circuit:** King v. General Electric Company, 960 F.2d 617 (7th Cir. 1992); Holzman v. Jaymar-Ruby, Inc., *supra;* **Eighth Circuit:** Williams v. Valentec Kisco, Inc., *supra*. More importantly, the holding of the panel is in direct conflict with the principles governing an employee's burden of proof in a pretext case as discussed by this Court in Hazen Paper Co. v. Biggins, *supra.* In Hazen Paper, in the context of an age discrimination case,[4] the Court clearly delineated the burden of the employee in establishing liability in a claim based on

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[4] While the principles set forth in Hazen Paper were discussed in the context of a claim under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, they have universal application to claims brought pursuant to other anti-discrimination statutes. Graham v. F. B. Leopold Co., 779 F.2d 170 (3d Cir. 1985); Stacey v. Allied Stores Corp., 768 F.2d 402 (D.C. Cir. 1985); Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981).

disparate treatment:

> In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. See, *e.g., United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-256 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576-578 (1978). The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. See, *e.g., Thurston, supra; Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 704-718 (1978). Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. See, *e.g., Anderson v. Bessemer City*, 470 U.S. 564 (1985); *Teamsters, supra*, at 334-343. *Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome. (Emphasis supplied).*

Id., 61 USLW 4325.

Contrary to the holding of the Third Circuit's panel, it is apparent that the findings which bottom the jury's verdict arose from an instruction which followed this established strict standard regarding an employee's burden of proof under state and federal law. Out of an apparent abundance of

caution, and in further explanation of the term "motivating factor," the district court instructed that the jury was required to determine that the plaintiff "would not have been discharged *but for* the fact that he had filed the employment discrimination charges against CIGNA":

> *If he would not have been discharged but for the fact that he had filed the employment discrimination charges against CIGNA, then retaliation would be a motivating factor* [emphasis supplied].

Charge of the Court, March 17, 1992.[5]

Accordingly, it is respectfully suggested that the reversal and remand for a new trial was erroneous and that the holding of the Third Circuit panel must be corrected to avoid injustice in this case and any further confusion as to this Court's

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[5] While the trial court used the word "motivating" instead of "determining", the charge contained the exact standard previously required in the Third Circuit, the same in part suggested by this Court in Hazen Paper and the identical charge requested by CIGNA and Graham. Hazen Paper Co. v. Biggins, 61 USLW at 4325; Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 57 (3d Cir. 1989); Ostrowski v. Atlantic Mutual Ins. Co., 968 F.2d at 176.

directives on the subject in the future.

II. BY HOLDING THAT CIGNA AND MARLENE GRAHAM DID NOT "INITIATE" THE PROSECUTION AGAINST JACKEY GRIFFITHS, THE MAJORITY PANEL IMPROPERLY IGNORED CONTROLLING PRINCIPLES OF PENNSYLVANIA LAW THEREBY REQUIRING THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

It is axiomatic that the doctrines of federalism and abstention which control the interrelationship of our state and federal courts require that federal courts must recognize that a state's highest court is the ultimate authority of its own legal principles. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); C.I.R. v. Estate of Bosch, 387 U.S. 456, 465 (1967); Connecticut Mutual Life Ins. Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983). This obligation is further codified in the Rules of Decision Act, 28 U.S.C. §1652:

> The laws of the several states, except where the Constitution or treaties of the United States or

> Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

These mandated principles are the cornerstone of the practical application of the doctrine of supplemental or pendent jurisdiction now codified at 28 U.S.C. §1367. See Hamilton v. Roth, 624 F.2d 1204, 1211 n. 7 (3d Cir. 1980); Promisel v. First American Artificial Flowers, 943 F.2d 251, 257 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 939 (1992).

> The system of federalism and abstention in the United States, that is, the principle that the federal courts will leave state laws to the interpretation of the state courts and federal courts will give state court interpretations priority when cases are brought in federal courts involving state laws, is a long and well-established principle of American jurisprudence . . . the Supreme Court has often expressed the essence of federalism, that state courts are the principal expositors of state law, and when federal courts disrupt that process of mediation by interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals.

U.S. v. McCullough, 760 F. Supp. 101, 102 (N.D. Miss. 1991).

It is equally axiomatic that federal courts are not free to ignore these principles of federalism and abstention regardless of their views on the correctness of the state court's determination on the relevant issue:

> [a]lthough petitioner marshals a number of sources in support of the contention that the state appellate court misapplied state law on these two points, the California Supreme Court denied review of this case and we are not free in this situation to overturn the state court's conclusions of state law.

Hicks on behalf of Feiock v. Feiock, 485 U.S. 624, 629-30 (1988).

Only in the most extreme circumstances are federal courts permitted to ignore established constructions of state law [Mullaney v. Wilbur, 421 U.S. 684, 691 (1975)] and where this strict requirement of application is violated by an appellate court, this Court should exercise its powers of supervision and correct the improper action. Rule 10(a) of the Rules of the Supreme Court of the United States.

In the present action, the Third Circuit Court of Appeals

has egregiously ignored an important and controlling principle of state law in vacating the judgment of the court below relating to the malicious prosecution claim of Jackey Griffiths. In order to protect the doctrines long established by the highest court of Pennsylvania, this Court should, and indeed must, intervene. Otherwise, the improper action of the Third Circuit Court of Appeals may affect state court law on the issue of malicious prosecution throughout the jurisdictions adhering to the directives of the Restatement (Second) of Torts.

As in most jurisdictions, the law in Pennsylvania relating to the tort of malicious prosecution is based on the Restatement (Second) of Torts, Section 653 and, therefore, under Pennsylvania law, a private person who initiates or procures institution of criminal proceedings against another resulting in arrest is responsible for any harm, if the proceedings were initiated with malice and without probable cause and the proceedings terminated in favor of the person accused. Hugee v. Penna. R.R. Co., 376 Pa. 286, 101 A.2d 740

(1954); Miller v. Penna. R.R. Co., 371 Pa. 308, 89 A.2d 809 (1952); Byers v. Ward, 368 Pa. 416, 84 A.2d 307 (1951); Simpson v. Montgomery Ward & Co., *supra*; Weiss v. Equibank, 313 Pa. Super. 446, 460 A.2d 271 (1983); Shelton v. Evans, 292 Pa. Super. 228, 437 A.2d 18 (1981); DeSalle v. Penn Central Transp. Co., 263 Pa. Super. 485, 398 A.2d 680 (1979); Casa di Sardi, Inc. v. Alpha Motors, Inc., 227 Pa. Super. 415, 323 A.2d 288 (1974).

The probable cause required has been defined as "a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation in believing that the party is guilty of the offense." Hugee v. Penna. R.R. Co., 101 A.2d at 742; Miller v. Penna. R.R. Co., 89 A.2d at 811-812; Wainauskis v. Howard Johnson Co., 339 Pa. Super. 266, 488 A.2d 1117, 1122 (1985).

It is not the actual guilt of the person accused but the reasonable and honest state of mind of the accuser which controls the issue:

> By probable cause is not meant an actual state of guilt. One is justified in launching a criminal prosecution if the facts convince him, as a reasonable, honest and intelligent human being, that the suspected person is guilty of a criminal offense. The arresting person may be in error, but if his error is an *honest one, not motivated by personal malice, bias or revenge*, the law will hold him harmless, regardless of the eventual result of the criminal prosecution. (Emphasis supplied).

Neczypor v. Jacobs, 403 Pa. 303, 169 A.2d 528, 530 (1961).

The issue, simply put, is whether the defendant *honestly believed* "that the accused committed the crime for which he was prosecuted and was that belief based on a reasonable ground of suspicion of guilt." *Id.* at 531.

Ironically, in this regard, the majority decision relies on cases and other authority which universally require that private persons who give a public official information of another's supposed criminal misconduct must do so in *good faith* and with the *honest and reasonable belief* that the accused was guilty. *See, e.g.,* Campbell v. Yellow Cab Co., 137 F.2d 918, 921 (3d Cir. 1943)("[i]f the person making the identification *believes it*

to be correct . . ."); Davis v. Equibank, et al., 412 Pa. Super. 390, 603 A.2d 637, 642 (1992)(private person must give "honest" as opposed to "truthful" information). Even comment g of Section 653 of the Restatement (Second) of Torts (the singular authority relied upon by the majority decision) clearly establishes the requirement that the accuser *believe* that the suggestion of guilt is true. The majority decision's legal allusion to cases involving negligent "misidentification" is also misplaced. Certainly, the jury's finding of malice and lack of good faith prevents any analogy to any case where the accuser *honestly* believes the identification to be correct.

More importantly, the majority opinion completely ignores controlling Pennsylvania Supreme Court authority which dictates that the element of initiation is satisfied if the private individual, with malice and without probable cause, sets the machinery of prosecution in motion. Simpson v. Montgomery Ward & Company, 354 Pa. 87, 46 A.2d 674 (1946).

The facts and legal determinations of that dispositive Pennsylvania Supreme Court case make it apparent that the action of the Third Circuit was untenable. In Simpson, a clerk of the defendant department store advised the manager of the shoe department that she saw plaintiff take a pair of shoes from the counter and place them in her shopping bag. She further reported that the plaintiff immediately entered the dressing room. The shoe manager in turn reported the matter to the assistant manager of the store, and both men went into the fitting room after plaintiff emerged. In the room, they found a bag filled with children's clothes but no shoes. The assistant manager of the store then saw plaintiff pick up a pair of shoes from a counter and drop those in another shopping bag she was carrying. He followed plaintiff from the store and confronted her. Without seeing what was in her bag, he left her and returned with the Chief of Police who took plaintiff into custody. No shoes were discovered in her bags.

A preliminary hearing was held before the prosecuting

authority during which it was established that the store employees *had not sworn out a complaint or urged that plaintiff be arrested*:

> At this later time a hearing was held before the Alderman. Bechtel testified that he made no recommendation to the Chief of Police that [plaintiff] be held for court and the Chief of Police confirmed this by saying that none of the employees of the Montgomery Ward Company "urged him to make an information against this woman" and that he made it because he "thought there was enough evidence at the Alderman's office to warrant such an action", and that whatever action he took against [plaintiff] was taken in his "official capacity as Chief of Police of the City of Butler."

Id., at 676.

None of the store employees was notified to appear when the criminal action was called and, accordingly, the charges were dismissed. Plaintiff then sued the defendant department store for malicious prosecution.

At the trial of plaintiff's claims, the trial court "permitted the jury to find (1) that Montgomery Ward and Company '*started* the machinery of the criminal law in Butler County',

and (2) that Montgomery Ward and Company in doing so acted without 'probable cause and was motivated by malice'. The jury found against the defendant and awarded plaintiff $3,000." *Id.* at p. 676. (Emphasis supplied).

The Supreme Court of Pennsylvania by Chief Justice Maxey held that the trial judge erred in submitting the issue of probable cause to the jury, instead of resolving the issue himself and ordered a retrial. However, in spite of the clear statement of the Chief of Police that the criminal action was taken against plaintiff because the facts as related to him warranted such action and that defendant's employees had not "urged" him to do so, the Court ordered the trial judge to submit the matter to the jury on special interrogatories:

> This case should be re-tried in accordance with the law and procedure set forth in this opinion. It would make for a just verdict in this case if the trial judge would submit to the jury questions for special findings as to the certain basic facts. See Restatement, Torts, § 673, comment d. Among those facts these should be included: (1) Did Mrs. Donna Yarger McCall honestly and reasonably believe that she "saw the younger

> woman" Alberta Simpson "put a pair off the counter" (of defendant's shoes) "into a shopping bag she had between her and the counter"? (2) Did Mrs. McCall report such an occurrence to the manager of the shoe department of the defendant's store, J. J. Burns? (3) Did Homer F. Bechtel, assistant manager of the defendant's store, on July 13, 1944, honestly and reasonably believe that he saw the plaintiff "pick up a pair of shoes" in defendant's store, "open a carrying bag and drop them in" and then "just in a split second leave the department" and go to the front of the store? (4) When H. E. Bechtel, defendant's assistant manager, made the complaint against plaintiff, to C. E. Fend, Chief of Police of Butler, was he acting on an honest and reasonable belief that he saw the plaintiff unlawfully take into possession the shoes which were the property of Montgomery Ward and Company? (Footnotes omitted).

Id., at 680-681.

The Court did not correct the trial court's charge on the issue of initiation but instead confirmed that the defendant need only "start the machinery" which led to plaintiff's prosecution, while also providing adequate protection against tort claims for an honest and good faith mistake:

> If any person has a *reasonable belief* that he has seen or heard another person commit a crime, he

> is justified if he takes appropriate action to start the machinery of the criminal law against the supposed criminal.

Id., at 682.

It is also well-settled that the requirement of probable cause demands that the accuser also make a full, candid and fair disclosure of the facts upon which the accusation is made to the prosecuting or arresting authority. Failure to do so will bring with it a concomitant failure to demonstrate probable cause. Lynn v. Smith, 281 F.2d 501 (3d Cir. 1960); Biggans v. Hajoca Corp., 185 F.2d 982 (3d Cir. 1950); Wainauskis v. Howard Johnson Co., *supra*; Hubert v. Atla Life Ins. Co., 136 Pa. Super. 147, 7 A.2d 98 (1939); Heisey v. Van Sant, 126 Pa.Super. 373, 190 A. 726 (1937). This view (well supported by the dissenting opinion of Judge Seitz) is bottomed on the obvious social policy that malicious half-truth communicated to a prosecuting authority would prevent the administration of justice. This view is well-supported in other jurisdictions as well. See, for example, Hirth v. Hall, 96 N.M. 58, 627 P.2d

1257 (1981); Thomas v. Cisneros, 596 S.W. 2d 313 (Tex.Civ.App. 1980); Rose v. Whitbeck, 277 Or. 791, 562 P.2d 188, *rehearing denied and opinion modified*, 278 Or. 463, 564 P.2d 671 (Or. 1977).[6]

In summary, it is apparent that the panel of the Third Circuit in the present case seriously disregarded longstanding and controlling principles of Pennsylvania law. Because of the almost universal reliance on the Restatement (Second) of Torts, that improper action could have influence far beyond the boundaries of that state and requires that this Court exercise its supervisory powers to correct it.

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[6] Contrary to Judge Seitz's suggestion, however, the defendant is not entitled to a new trial on the issue of malicious prosecution because of erroneous jury instructions.

Pennsylvania law does establish the required ground of suspicion "must not be based upon an inadequate and unreasonable investigation of the circumstances concerning the alleged criminal conduct." Wainauskis v. Howard Johnson Co., 488 A.2d at 1123. *See also* Hugee v. Penna. R.R. Co., *supra*; Neczypor v. Jacobs, *supra*; Byers v. Ward, *supra*.

In reviewing this element, the Third Circuit has affirmed a jury's conclusion that the defendant did not have an honest and reasonable belief where appropriate caution was not taken before the accusation was made. Biggans v. Hajoca Corp., *supra*.

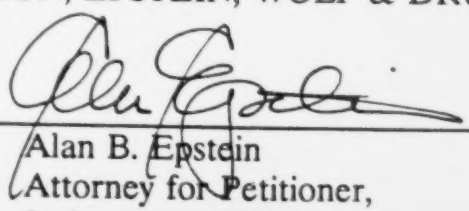
III. CONCLUSION

It is respectfully suggested that in the context of a claim of unlawful retaliation in violation of Section 704(a) of the Civil Rights Act of 1964 and §955(d) of the Pennsylvania Human Relations Act, the panel improperly demanded a heightened burden of proof ("sole factor") overruling the well-established principle that the plaintiff need only establish that retaliatory intent actually played a role in the improper action of the employer and had a "determinative" influence on the outcome of the employer's decision-making process. Hazen Paper Co. v. Biggins, *supra.*

It is further suggested that in the context of the malicious prosecution claim, the majority decision of the panel completely ignored the controlling decision of the Pennsylvania Supreme Court in vacating the verdict of the jury. Both the Pennsylvania Supreme Court and the jury have spoken. The law requires that the Court of Appeals not raise its voice above theirs. It is certainly within the supervisory powers of this

Court not to allow the important principles embodied in the decisions of the Pennsylvania Supreme Court to be so egregiously ignored.

JABLON, EPSTEIN, WOLF & DRUCKER

By: 

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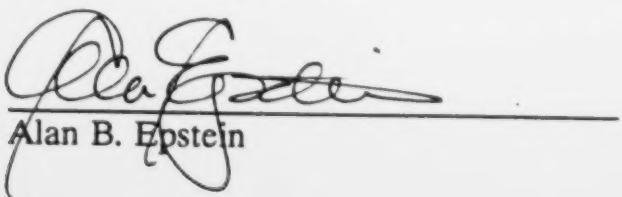
Dated: July 13, 1993

CERTIFICATION OF SERVICE

I hereby certify that two copies of the within Petition for a Writ of Certiorari has been served on all interested counsel by United States Mail, postage prepaid, on Tuesday, July 13, 1993, as follows:

James B. Herman, Esquire
Corporate Law Department
CIGNA Companies
One Liberty Place, 52nd Floor
P. O. Box 7716
Philadelphia, PA 19192-1520



Alan B. Epstein

Dated: July 13, 1993

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JACKEY B. GRIFFITHS	:	CIVIL ACTION
	:	
v.	:	
	:	
CIGNA CORPORATION, et al	:	
	:	NO. 91-2356

CIVIL JUDGMENT

Before The Honorable Donald VanArtsdalen

AND NOW, this 17th day of March 1992, in accordance with the Verdict rendered by the Jury

IT IS ORDERED that Judgment be and the same is hereby entered in favor of plaintiff Jackey Griffiths and against defendants CIGNA and Marlene Graham in the amount of $77,500 in compensatory damages. Judgement is also entered in favor of plaintiff Jackey Griffiths and against defendant CIGNA in the amount of $250,000 and against defendant Marlene Graham in the amount of $50,000 for punitive damages.

BY THE COURT:

ATTEST: s/ James Finegan
Acting Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

JACKEY B. GRIFFITHS, Plaintiff	:	CIVIL ACTION NO. 91-2356
v.	:	Philadelphia, Pennsylvania
CIGNA CORPORATION, INC., Defendant	:	May 13, 1992 9:30 o'clock a.m.

HEARING
BEFORE THE HONORABLE DONALD W. VANARTSDALEN
UNITED STATES DISTRICT JUDGE

- - -

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- - -

Audio Operator: James Finegan

Transcribed by: Paula L. Curran

(Proceeding recorded by Electronic Sound Recording; transcript produced by computer-aided transcription service.)

And in that case, the trial court had submitted the issue similarly to the court in this case and then the Third Circuit reviewed what they had done and found that they should have submitted more detailed interrogatories. And the reason for that was because they felt that the "better method" should have been invoked in that case. And the "better method" being that there were factual -- where the interrogatories set forth the factual disputes, as I have contended before.

In that case, there was an interesting concurring opinion by Judge Rosen, who came to the same conclusion, that the case should have been submitted to the jury on detailed factual interrogatories. Although, he came at it from a different point, he was -- he said that the applicable law on that was Federal Law. Because it was a procedural issue as to the function of --

THE COURT: Well, there is no question that in the Third Circuit, that the question of probable cause is a matter for the judge, judge to determine, based upon factual determinations to be made by the jury. That's what I tried to do here. As I say, I think, as a practical matter, it's almost impossible in some cases, to give all possible factual issues. But, I think that the essential factual issues were determined by the jury. Now, I may be wrong about that, but that's my view of it.

On the other hand, the plaintiff contended that he had been falsely accused, that there wasn't even a probable basis for having him arrested. And that therefore, he was entitled to bring the suit for malicious prosecution.

The jury returned answers to interrogatories and based on those interrogatories, although I did not make -- state affirmatively so, on the record, so far as I know, but by entering judgment. I made it clear that, based on the answers to interrogatories, there was probable cause -- there was not probable cause, rather, for the arrest of Jackey B. Griffiths. And to the extent that's required, I would make that finding now, on the motion for judgment NOV and for a new trial.

So far as legal issues are concerned in this case, there is an interesting situation as to the obligation of a private individual when giving information to police, which the private individual has every reason to believe and wants the police to proceed with prosecution -- prosecuting a person on the basis of the information given to the police. And that is the contention made by the defendant and I think, rather consistently throughout the trial of this case and on motions for summary judgment, that if the information that is given to the police is true and correct and accurate information, that that's all that the individual has to do and the individual cannot thereby be held liable for

malicious prosecution, if the police go ahead and prosecute on the basis of that information.

And it apparently, is defendant's contention that that is true even if, the private individual intentionally and knowingly withholds important information that would have affected the decision made by the police in prosecuting the case. At least, that's my understanding of the defendant's contention.

There are, of course, countervailing public policies and you can see this throughout the cases. As I think I mentioned before, the earlier cases seem to suggest that citizens should be encouraged to come forward with information to the police, to give the police, to assist the police, so that they may go ahead and bring prosecutions.

Later cases suggest that, of course, private individuals should be encouraged to cooperate with the police, but they must be encouraged to cooperate honestly and in good faith with the police, which means that when they give information to the police, they must not withhold information that they know and they must make a reasonable investigation, before giving information to the police, which they certainly would have reason to know would lead to the arrest.

And I think that is the basic difference, so far as the law is concerned. If this were a case of first

impression, if I were, as some of the judges like to say, writing on a clean slate, although I never saw a clean slate in the classrooms that I remember in school. Because I usually had the job of cleaning them myself, with the erasers. Often, during singing class, because I couldn't sing, but that's beside the point.

If this were -- if this were a new case, a first impression, I would be inclined to agree with the defendants that all that a person is required to do is to give truthful information to the police and is under no obligation to make any investigation as the police see fit to prosecute on that information, with or without further investigation. That I would not be responsible, unless I gave some sort of perjured testimony.

However, that does not appear to me to be the Law of Pennsylvania as it presently exists. And I think that it's quite clear from recent cases, such as Wainauskis versus Howard Johnson Company, 488 Atlantic Second, 1117, that where it stated that probable cause is a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary, prudent man, in the same situation, in believing that the person is guilty of the offense. And then it goes on to say, the reasonable ground of suspicion, however, must not be based on an inadequate or unreasonable investigation of the circumstances concerning the alleged criminal conduct.

And that a case cites back to the Neczypor and that's -- well, let's get it correct here, N-E-C-Z-Y-P-O-R versus Jacobs at 403 PA, 303. And various other cases.

Counsel for defendant has cited, among other cases, the rather recent case of Hess versus County of Lancaster at 514 Atlantic Second, 681, Commonwealth Court, 1986. Which refers to subsection G or Section 653 of the re-statement. And it cites Section 653, which says a private person who gives to a public official information of another supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative. But, giving the information or even making an accusation of criminal misconduct, does not constitute a procurement of the proceedings, initiated by the officer, if it is left entirely to his discretion to initiate the proceedings or not.

Then it goes on to say, however, in that case, if however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible. And a prosecution based upon it is procured by the person giving the false information. In order to charge a private person with responsibility for the initiation of proceedings, by a public official, it must therefore appear, that his desire to have the proceedings initiated expressed by direction, request or pressure of any kind, were the

determining factor in an official's decision to commence the prosecution.

And let me interject that I think the evidence is clear that that was the situation here. But it goes on, or that the information furnished by him, upon which the official acted, was known to be false.

Now, in the answers to the interrogatories, although the jury answered Interrogatory 5, that all the significant facts that the defendant provided to the police -- Philadelphia Police -- were true. It did also find that they did -- that the defendant did not honestly and in good faith, upon reasonable investigation, believe all of the information given, to be true.

Now, that may sound a bit inconsistent, but I think that it's because of the fact that in Number 7, the jury determined that the defendants intentionally and knowingly failed to provide all of the significant fact that they then knew and that they knew would be of significance to the Philadelphia Police in conducting the investigation. So that, the jury concluded that they were, in fact, withholding knowingly and intentionally, some information. Now, that information could have been two-fold or it could have been various information. But, among other things, it's been suggested that it was the possibility of the -- of other people having master keys. But, there was also withheld and

this was brought out in the testimony, that there were other persons who had come under suspicion by Cigna. And Marlene Graham testified as to the investigations she made as to how she concluded that it must be somebody from the security, from her own security department that was responsible, at least for some of these thefts. And matched up the days when computer thefts occurred and when employees were on duty and she did not provide the name of one other person.

So, there were several bases upon which the jury could find that there was information withheld. Information that would have been of importance to the Philadelphia Police and which the jury found that the defendants withheld that knowingly and intentionally. And they also found that they did not provide the Philadelphia Police with all of the information, which a reasonable person would have provided under the -- under the circumstances.

And they also found under Number 8, that at the time the defendants provided the information to the Philadelphia Police, that the defendants did not honestly and in good faith, reasonably believe the plaintiff probably sold Cigna computer equipment.

It seems to me, therefore, that the issue of whether or not there has to be some type of reasonable investigation is foreclosed in Pennsylvania. Even under Section 653-G of the re-statement. And therefore, I believe that this matter

was properly submitted to the jury, on that particular standard and with the questions as to whether or not there was a reasonable investigation.

There is a contingent in this case that there was surprise testimony that was not contained in the pre-trial memos. That the plaintiff deliberately withheld this information and that had to do with the question of who of the Cigna employees might have had so-called, master keys.

I have reviewed the evidence on this matter rather carefully and as I pointed out to counsel in the argument, it's still not clear to me, from reading this, whether everybody is in agreement or understands or uses the same definition of what is or is not a master key. Or keys. It is clear that the defendants, through Cigna employees, knew that there were persons, at least, who had keys which some of the other employees referred to as master keys. Or keys to many of the locked areas, including these computer areas of the -- of the Cigna building.

It may be that defendants did not anticipate that the plaintiff would testify that there were many people who had other keys and other access to these particular areas, other than security guards, but I see no reason why they should have been surprised by that. There was a contention made that he -- that plaintiff did not answer interrogatories which required such an answer. And I think the interrogatory

is, upon what other -- upon what facts do you contend that you were falsely prosecuted or something to that effect. And I think to suggest that that mandates that the plaintiff would have to say that there were other persons who had master keys, is stretching the requirement of answering interrogatories, to an extreme.

In addition to that, if there was any surprise by it, over the objection of plaintiff, I allowed the defendant to call any witness or witnesses they wanted, to rebut that particular evidence in testimony. Witnesses were called, ostensibly for that purpose, although as far as I can tell, the actually verified, to some extent, the testimony of the plaintiff in that regard.

I would point out, as I did in oral argument, that there was a hiatus there, I thought it was a weekend. I am advised it was a hiatus of four days, I think, because of perhaps, a holiday that came in at that time. So, that I can't see how that would constitute any serious surprise and I don't think that it would require a new trial. I think that provision was given for that. Certainly, plaintiff was not asked that question, directly, on his deposition, despite the fact that -- that there was argument made and questions asked during the trial as to why he didn't say something about that during his deposition.

And when you read the transcript of the deposition,

it is clear that whatever explanation he intended to give, he was cut short by the defense counsel who was conducting the deposition. I'm not suggesting that was improper for defense counsel to do, under those circumstances, but certainly, it doesn't well suit the defendant's counsel to now argue that he was surprised, because this was not disclosed during the course of the deposition. And when that direct question was not asked and therefore, the fact that plaintiff said that he thought that he would keep something for trial, because, as a matter of fact, I think the statement made was to the effect, well, you can give your explanations to the judge and jury at the time of the trial. So, I can't see anything, any reversible error -- by reversible error, I mean any basis for granting a new trial or any change in the judgment by reason of that.

Now, there has further been a contention that the instructions given on retaliation were confusing and not correct and particularly because I did not charge that to be actionable, the retaliation must be the so-called, but for -- or meet the so-called, but for, test. Although, that language was used during the course of the charge. I'm not going to go over that in detail.

If I have incorrectly instructed the jury as to that, I'm sure that it can be corrected later on, but the instructions that I gave on retaliation began on Page 6 and

continued on through, I believe, through approximately, Page 12. I used the expression that if it was a motivating factor and I think that is the test. That if it -- if it is a motivating factor, it need not be the sole or only factor. I think everybody agrees with that. And I did tell the jury -- I think the charge, if anything, was probably more favorable to the defendant then what the law requires the charge to be, in that regard.

Now, I think that covers most of the contentions that have been made here, asking that the award be, that there be an amendment of the judgment and that there be a grant of a new trial.

I think the important thing is that the jury, in this case, made a determination that the -- at the time the information was given to the police, the defendants did not honestly and in good faith believe that -- that he was guilty of the offense charged. And that's in answer to question number 3, which the answer is, no.

Probable cause, as I understand it, has two elements to it. There must be factually probable cause from an objective standpoint. And there must be a subjective probable cause, which means that a party must, in honest and good faith, believe that the person committed the offense. Of course that also goes, somewhat, to the question of -- of good faith and a subjective motive. And question 3 answers

the subjective motive test and I believe 7 and 8, adequately answer the objective test. Although, it is still for the Court to determine, on the basis of the answers to the interrogatories, that there be a finding of probable cause. And I believe that both objectively and subjectively, there is basis for finding that there was lack of probable cause in this case.

I know that the cases require that factual issues be submitted to the jury, whether that means all detailed factual issues must submitted, I'm not sure, but I would point out that in Neczpor versus Jacobs, questions -- two critical questions are very similar to the questions that were asked in this case, I believe it's 3 and 7 and possibly 8. That were asked in the special interrogatories.

I recognize that this case does have certain legal issues in it, that are difficult. I ruled on them to the best of my ability during the course of the trial. I think that there was a fair trial accorded to both of the parties here. The jury made its decision. We do not know, I suppose the plaintiff is the only one that actually knows whether or not he was improperly prosecuted in the sense of factually, whether or not he was the guilty party. But that wasn't the issue for the jury and it was made clear to them that that was not the issue. And I'm sure that they did not base their decision on deciding whether or not he committed the

particular offense.

Therefore, all of the post-trial motions that were filed on behalf of the defendant are denied. All right, thank you very much.

COUNSEL: Thank you, your Honor.

(Court adjourned at 11:10 o'clock a.m.).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JACKEY B. GRIFFITHS	:	CIVIL ACTION
vs.	:	
CIGNA CORPORATION and MARLENE GRAHAM	:	NO. 91-2356

ORDER

AND NOW, this 13th day of May, 1992, upon consideration of defendants' Motion for New Trial and Amendment of the Judgment and plaintiff's Response thereto, defendants' Motions are DENIED.

s/Donald W. VanArtsdalen
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1413

JACKEY B. GRIFFITHS
v.
CIGNA CORPORATION,
MARLENE GRAHAM, Individually
and in her own official
capacity as head of Security
with CIGNA CORP.

CIGNA Corporation and Marlene Graham,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 91-2356)

Present: Sloviter, Chief Judge, Greenberg and Seitz, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on December 3, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 18, 1992, be, and the same is hereby reversed and the cause is remanded to the District Court for entry of judgment in favor of appellants on the malicious prosecution

claim and for the holding of a new trial on the retaliation claims. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: March 17, 1993

Costs taxed in favor of the appellants as follows:

Brief	$ 75.60
Appendix	171.60
Reply Brief	33.60
TOTAL	$280.80

Certified as a true copy and issued in lieu
of a formal mandate on April 22, 1993

Teste: s/ P. Douglas Sisk
Clerk, United States Court of Appeals
for the Third Circuit

Filed March 17, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1413

JACKEY B. GRIFFITHS

v.

CIGNA CORPORATION,
MARLENE GRAHAM, Individually
and in her own official
capacity as head of Security
with CIGNA CORP.

CIGNA Corporation and Marlene Graham,

Appellants

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 91-2356)

Argued December 3, 1992

BEFORE: SLOVITER, *Chief Judge*,
and GREENBERG and SEITZ, *Circuit Judges*

(Filed: March 17, 1993)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. Factual and Procedural Background

In this civil action the jury returned a verdict against the defendants-appellants CIGNA Corporation and Marlene Graham, CIGNA'S head of security, for $377,500 in favor of the plaintiff-appellee Jackey B. Griffiths on his claims for retaliatory discharge under section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), and section 5(d)

of the Pennsylvania Human Rights Act ("PHRA"), Pa. Stat. Ann. tit. 43, § 955(d) (Supp. 1992), and for malicious prosecution, under Pennsylvania common law. The appellants filed a motion for a new trial and an amendment of judgment which the district court denied in an order entered May 14, 1992. The appellants have appealed from that order, contending that the court improperly charged the jury both on the burden of proof on the retaliatory discharge claims and on the elements of the malicious prosecution claim. We agree and therefore will reverse the order of the district court.[1]

The germane facts as developed at the trial are as follows. Griffiths, a Jamaican immigrant, began work at CIGNA as a part-time security guard on January 2, 1985. Eventually, he was promoted to full-time security guard and assistant supervisor. Griffiths was assigned to work at a building at 1600 Arch Street, Philadelphia, referred to as the "Home Office," and at a connected building called the "Tower Building."

In February 1990, Griffiths applied for a position of shift supervisor. When he did not obtain the promotion, he concluded that Graham denied it to him on the basis of his national origin. On March 13, 1990, a day after learning that the decision not to promote him was final, Griffiths filed a

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1. We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 42 U.S.C. § 2000e-5(f)(3), and 28 U.S.C. § 1367. The verdict and consequently the judgment entered thereon were not the same with respect to damages against both appellants, but we need not break down the allocation of damages in this opinion.

charge with the Equal Employment Opportunity Commission, asserting that CIGNA had discriminated against him because of his national origin.[2] The EEOC sent notice of the charge to CIGNA's security department on or about March 16, 1990.

The day that he filed the EEOC charge, Griffiths left work early, purportedly because the stress he was suffering from being passed over exacerbated a pre-existing high-blood pressure condition. Griffiths subsequently filed a disability claim, asserting that he was disabled as a result of this condition. He never returned to work for CIGNA.

From October 1989 through March 1990, CIGNA lost property valued at approximately $105,000 through the thefts of computers from the Home Office and Tower Building. On the evening of March 12-13, Griffiths' last day of work, someone stole two computers from a locked area of the Tower Building. On March 20, 1990, Graham sent a three-page report about the thefts to the Philadelphia Police Department stating that "[i]nformation gathered concerning the latest thefts *suggests* that Assistant Supervisor Jackey Griffiths working in connection with a former CIGNA security officer Tony Bolton *may* be responsible for some if not all of the computer thefts." (Emphasis added.) The report noted that there was no sign of forced entry in the area from which the computers were stolen; Griffiths had a master key

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2. In his district court complaint, Griffiths suggested that CIGNA discriminated against him on the basis of race when it did not promote him as "the promotion went to a less senior white employee." But the EEOC charge was not predicated on racial discrimination.

to that area; Bolton was fired and Griffiths recently was passed over for a promotion to supervisor; a check of the daily attendance sheets showed that either Bolton or Griffiths was working at the time of all the reported thefts; Bolton often called Griffiths at work; on the night of the latest computer theft Bolton's call was transferred to Griffiths at an office on the floor where the theft occurred; and two security officers assigned to Griffiths' shift stated that Griffiths habitually disappeared for three to four hours at a time in the Tower Building, taking its keys with him. The report, however, did not request that the police prosecute or arrest either Griffiths or Bolton.

Dennis Nast, the Philadelphia detective assigned to the case, interviewed Graham and other CIGNA employees about the matter. Based on these interviews and Graham's report, Nast prepared an affidavit of probable cause for a warrant for Griffiths' arrest which he submitted to the charging unit of the office of the Philadelphia District Attorney for a determination of whether the facts submitted constituted probable cause. After the District Attorney's office concluded that there was probable cause, Nast submitted the affidavit to the bail commissioner, a judicial officer of the Court of Common Pleas for Philadelphia County, who also found probable cause and thereafter issued a warrant for Griffiths' arrest. The Philadelphia police arrested Griffiths on April 13, 1990, but on April 23, 1990, the court dismissed the charges at a preliminary hearing.

On May 1, 1990, Graham sent a letter to Griffiths, who though not then reporting for work was still a CIGNA employee, instructing him to meet with CIGNA's corporate audit department to

answer questions concerning the computer thefts occurring on the last night he was on duty. Griffiths, however, refused to speak to the audit department except through his attorney. The appellants then terminated Griffiths' employment on May 4, 1990, ostensibly because his failure to cooperate with the investigation of the theft constituted insubordination. On April 11, 1991, Griffiths filed this suit in the United States District Court for the Eastern District of Pennsylvania alleging claims of retaliatory discharge in violation of federal and Pennsylvania statutory law and the common law tort of malicious prosecution.[3]

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3. While we only are concerned with these two claims, Griffiths' complaint was much broader and contained ten counts: *Count I*: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (race and national origin discrimination); *Count II*: Title VII, 42 U.S.C. § 2000e-3(a) (retaliation); *Count III*: PHRA, Pa. Stat. Ann. tit. 43, § 951 *et seq.* (1991) (race and national origin discrimination); *Count IV*: PHRA, Pa. Stat. Ann. tit. 43, § 955(d) (Supp. 1992) (retaliation); *Count V*: The Civil Rights Act of 1866, 42 U.S.C. § 1981 (race and national origin discrimination); *Count VI*: malicious prosecution; *Count VII*: false arrest and imprisonment; *Count VIII*: defamation; *Count IX*: specific intent to harm; *Count X*: intentional infliction of emotional distress. Prior to trial Griffiths withdrew his claims for discrimination (Counts I, III and V), and at the trial the district court directed a verdict in favor of the appellants on the claims of false arrest and imprisonment (Count VII), specific intent to harm (Count IX), and intentional infliction of emotional distress (Count X). Thus, only the claims of defamation, retaliation, and malicious prosecution went to the jury. The jury found in the appellants' favor on the defamation claim. Griffiths has not cross-appealed from either the directed verdict or the judgment on the defamation claim.

At trial, Griffiths argued that the appellants falsely accused him of the thefts and fired him because he had filed the EEOC charge. Griffiths presented testimony showing that Graham did not inform the police that she knew that other employees had access to the locked areas where the computers were located, and that she had suspected another supervisor who was in the Tower Building on March 12, 1990, of having been involved in computer thefts over the previous several months. For her part, Graham testified that CIGNA fired Griffiths because he refused to cooperate with the internal investigation by the audit department. Furthermore, she denied that the EEOC charge played a role either in Griffiths' termination or her act of reporting him to the police. Indeed, Graham claimed not to have known of the employment discrimination charges until early April, several weeks after she sent her report to the police.

The court submitted the case to the jury on special interrogatories, and it found for Griffiths on both the malicious prosecution and retaliation claims awarding compensatory and punitive damages. It returned its verdict on the malicious prosecution count, notwithstanding its finding in an answer to a special interrogatory that "all of the significant facts that the [appellants] provided to the Philadelphia police [were] true." As we have indicated, the appellants have appealed from the order of May 14, 1992, denying their post-trial motions.

II. *Standard of Review*

Normally, we review a district court's ruling on a motion for a new trial for abuse of discretion,

but here our review is plenary as the district court's denial of the motion was based on the application of legal precepts. *See Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992); *Waldorf v. Shuta*, 896 F.2d 723, 737 (3d Cir. 1990). Furthermore, while we ordinarily review a district court's ruling on points for charge on an abuse of discretion standard, *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 922 (3d Cir. 1986), in this case we are exercising plenary review because the appellants contend that the charge taken as a whole does not state the correct legal standard. *See Savarese v. Agriss*, 883 F.2d 1194, 1202 (3d Cir. 1989). Thus, we will review the charge as a whole in the light of the evidence to determine if it fairly and adequately submitted the issues to the jury and we will reverse if the instructions were capable of confusing and thereby misleading the jury. *See Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1259 n.15 (3d Cir. 1991) (in banc).

III. *Discussion*

1. *Malicious Prosecution*

The appellants first maintain that the court erred in instructing the jury on the Pennsylvania law of malicious prosecution in both the charge and the special interrogatories. In particular the appellants contend that the court misstated the law in telling the jury that the appellants had a responsibility to conduct a reasonable investigation of the theft of the computers, to determine the significant facts, and to report all the facts to the

police before focusing police attention on Griffiths.[4] The appellants urge that they had no obligation to investigate inasmuch as they did not file the complaint or demand Griffiths' prosecution, but only informed the police of certain information which suggested his guilt. They further argue that they could not be liable because the information they gave to the police was accurate.

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4. The court instructed the jury:

> If the defendants reasonably believed and in good faith honest [sic] believed upon a *reasonable investigation*, that the facts provided to the police were correct, they would not be liable for malicious prosecution even if some of those facts later turned out to be incorrect.

JA 206 (emphasis added).

The interrogatories and answers on the malicious prosecution were as follows:

> 2. Did the defendants initiate criminal proceedings against the plaintiff to retaliate against him because he had filed a charge of employment discrimination against CIGNA? YES
>
> 3. Did the defendants have an honest, good-faith belief that the plaintiff probably stole CIGNA computer equipment as of the time defendants provided information to the Philadelphia police? NO
>
> 4. Did the defendants maliciously institute criminal proceedings against the plaintiff? YES
>
> 5. Were all of the significant facts that the defendants provided to the Philadelphia police true? YES
>
> (a) Honestly and in good faith and upon reasonable investigation believed to be true? NO
>
> . . .

We agree with the appellants' contentions. Therefore, even though the jury found in its answers to interrogatories that the appellants initiated the criminal proceedings without an honest, good faith belief that Griffiths stole the computers, and did so maliciously to retaliate against Griffiths for his EEOC charges without providing the police with all the significant facts they then knew or could have obtained through a reasonable investigation, we are constrained to reverse.

Under Pennsylvania law, which the parties agree is applicable to the malicious prosecution claim, a plaintiff must prove that the defendant (1)

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7. Did the defendants fail to provide the Philadelphia Police with all of the significant facts they then knew, *or on reasonable investigation should have known, and* that the defendants then knew or *should have known* would be significant to the Philadelphia police in conducting the investigation? YES

If No. 7 is answered YES, was such significant fact (or facts) omitted

(a) Intentionally and knowingly? YES

(b) Recklessly? NO

(c) Negligently? NO

8. At the time that the defendants provided information to the Philadelphia police, would a reasonable person, knowing all of the facts then known by the defendants and all of the facts that, *upon a reasonable investigation should have been known to the defendants*, honestly and in good faith reasonably believe that the plaintiff probably stole CIGNA computer equipment? NO

JA 225-26 (emphasis added except for the "and" in question 7).

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instituted the proceedings (2) without probable cause and (3) with actual malice and (4) that the proceedings terminated in favor of the plaintiff. *Kelly v. General Teamsters, Local Union 249*, 544 A.2d 940, 941 (Pa. 1988). While the appellants do not deny that the criminal proceedings terminated in Griffiths' favor, they dispute the existence of the remaining elements. Malice has been stated to include ill-will in the sense of spite, the use of a prosecution for an extraneous, improper purpose, or the reckless and oppressive disregard of the plaintiff's rights. *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988); *Hugee v. Pennsylvania R. Co.*, 101 A.2d 740, 743 (Pa. 1954). Malice may be inferred from the absence of probable cause. *Kelly*, 544 A.2d at 941; *Hugee v. Pennsylvania R. Co.*, 101 A.2d at 743. Probable cause is proof of facts and circumstances that would convince a reasonable, honest individual that the suspected person is guilty of a criminal offense. *Bruch v. Clark*, 507 A.2d 854, 857 (Pa. Super. Ct. 1986). However, before a court determines whether the plaintiff has demonstrated the absence of probable cause and the presence of malice, it is appropriate for it to address the more fundamental question of whether the defendant either directly instituted the proceedings against the plaintiff or can be charged with the responsibility for the institution of the proceedings. Therefore, we turn our attention to the jury charge in connection with the evidence regarding this element of a claim for malicious prosecution.

Pennsylvania courts have considered a defendant's responsibility for the initiation of proceedings element of malicious prosecution by referring to section 653, comment g of the

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Restatement (Second) of Torts. *See Campbell v. Yellow Cab Co.*, 137 F.2d 918, 921 (3d Cir. 1943); *Davis v. Equibank*, 603 A.2d 637, 640 (Pa. Super. Ct. 1992); *Hess v. County of Lancaster*, 514 A.2d 681, 683 (Pa. Commw. Ct. 1986).[5] Comment g

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5. Comment g provides, in pertinent part:

> A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, *the informer is not liable . . . even though the information proves to be false and his belief was one that a reasonable man would not entertain.* The exercise of the officer's discretion makes the *initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.*
>
> If however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. *In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false.*

Restatement (Second) of Torts § 653, comment g (emphasis added).

distinguishes between situations in which a private individual files a complaint or demands a prosecution and those in which he merely provides information to the police. Comment g makes clear that in the latter case a private individual who does not knowingly provide false information is not responsible for the institution of the proceedings, and thus cannot be held liable for malicious prosecution as he need not have had a reasonable basis for making the accusation. *See also Campbell v. Yellow Cab Co.*, 137 F.2d at 921 (holding person who merely identifies suspect and "does not otherwise attempt to influence the officers in the exercise of their discretion as to the prosecution of the person identified [if] the person making the identification believes it to be correct . . . is not deemed the instigator of criminal proceedings subsequently begun by the police . . ."); *Davis v. Equibank*, 603 A.2d at 640 (refusing to permit imposition of liability on witness for negligent misidentification of robbery suspect).

In this case, the court in its charge to the jury and special interrogatories did not apply these principles. Rather it apparently assumed that the facts supported a finding that the appellants initiated the proceedings. In charging the jury, the court commented:

> The evidence seems clear in this case that the criminal proceedings, although formally filed by the Philadelphia Police, were initiated and instigated by CIGNA, although of course that would be a matter for you to decide.

Yet there was no evidence that the appellants directed, requested, or pressured Nast to prosecute

Griffiths. Nast testified that he sought the arrest warrant on his own initiative because of the *information* he obtained from Graham and from his own investigation. Neither Nast's testimony nor Graham's memorandum to the police indicates that the appellants demanded Griffiths' prosecution or deprived the police of their discretion with respect to the institution of criminal proceedings. In fact, Graham's memorandum did not even accuse Griffiths of the thefts. Rather it only "suggests" that he "may" have been responsible and thus was doubly equivocal. It is true that Nast testified that if he had known that other CIGNA employees had access to the area where the computers were stored, he would have investigated further before seeking a warrant for Griffiths' arrest. But the appellants did not conceal this additional information for it is undisputed that Nast did not ask Graham about other suspects.

In these circumstances, inasmuch as the appellants did not file a complaint in court and did not direct the police to prosecute Griffiths, the only question that the jury should have answered was whether the appellants knowingly provided false information to the police. Therefore, as the jury found that the facts Graham furnished were true, the appellants as a matter of law cannot be deemed to have been responsible for the initiation of the criminal proceeding against Griffiths. It accordingly follows that they cannot be liable for failing to conduct a reasonable investigation. The district court, therefore, should not have permitted the jury to answer the remaining interrogatories on the malicious prosecution claim and to return a verdict on the basis of the answers to those

interrogatories. Rather, the court should have told the jury that if it determined that the appellants gave accurate information to the police, its deliberations on the malicious prosecution claim were over and the other interrogatories on that claim did not have to be answered.

In reaching our result, we do not ignore the cases which Griffiths cites for the proposition that a private individual, in certain instances, must conduct a reasonable investigation to satisfy the probable cause requirement. But these cases are not helpful to Griffiths because in this case the appellants were entitled to a judgment in their favor without regard for whether they had probable cause, for they were not responsible for the institution of the proceedings against Griffiths. Indeed, these cases reinforce our conclusion that a person is required to have a reasonable basis for seeking the prosecution only if the person actually swears out the complaint or is responsible for the initiation of the proceedings by explicitly directing that a prosecution be started against the accused. *See, e.g., Biggans v. Hajoca Corp.*, 94 F. Supp. 593 (E.D. Pa.), *aff'd*, 185 F.2d 982 (3d Cir. 1950)(defendant hired private detectives and brought charges against plaintiff); *Kelly v. General Teamsters, Local Union 249*, 544 A.2d at 941 (charges brought against plaintiff by attorney retained by defendant union); *Neczypor v. Jacobs*, 169 A.2d 528 (Pa. 1961) (defendant was police officer who, after being involved in an automobile accident with plaintiff, personally arrested plaintiff); *Hugee v. Pennsylvania R. Co*, 101 A.2d 740 (plaintiff was arrested by defendant railroad's employees); *Miller v. Pennsylvania R. Co.*, 89 A.2d 809 (Pa. 1952) (same); *Byers v. Ward*, 84 A.2d 307

(Pa. 1951) (defendants caused warrants to be issued for plaintiffs' arrests on charges of stealing coal); *Wainauskis v. Howard Johnson Co.*, 488 A.2d 1117 (Pa. Super. Ct. 1985) (defendant filed charges after the police informed it that they would not undertake the prosecution); *Shelton v. Evans*, 437 A.2d 18 (Pa. Super. Ct. 1981) (defendant caused complaint to be signed for plaintiff's arrest).

Griffiths argues that, notwithstanding Nast's freedom of action, we should uphold the denial of the order of May 14, 1992, based on the jury's finding in its answers to the special interrogatories. Griffiths notes that although the jury indicated on the special verdict sheet that the facts reported in Graham's memorandum were true, the jury also found that the appellants lacked a good faith belief in his guilt, deliberately did not disclose significant information, and reported him out of malice and to retaliate for his filing the EEOC charge. The jury was not called upon to identify the omitted information, but the record would support a finding that the omitted information was that other CIGNA employees had master keys which would have allowed them access to the secured areas from which the computers were stolen and that Graham had previously suspected one of these employees. Thus, Griffiths argues that even in a case in which the police prosecute an individual based on accurate information supplied by a private person, that person still can be liable for malicious prosecution if she did not believe in the guilt of the accused and failed to provide information the police reasonably might have needed.

Of course, the short answer to Griffiths' contention is that these jury findings are simply not germane and should never have been made, inasmuch as the facts in Graham's report to the police were true. Yet we have an unusual situation here because the jury did make the seemingly inculpatory findings. But these findings cannot help Griffiths for we are convinced that the Pennsylvania Supreme Court would not allow the imposition of liability for malicious prosecution on a defendant whose connection with the prosecution has been limited to supplying truthful information to the police. Furthermore, there is no requirement under Pennsylvania law that the informant believe in the guilt of the suspect. We recognize that some cases have stated that a private person may face liability if he did not have a good faith belief in the suspect's guilt, or did not disclose material information, but those cases do not speak to the situation of a private person merely supplying accurate information to the police. Instead, those cases concerned persons who either knowingly provided false information, *Byers v. Ward*, 84 A.2d at 309 (defendants accused of providing false testimony and documentary evidence), or actually initiated the prosecution. *Wainauskis v. Howard Johnson Co.*, 488 A.2d at 1123 (upholding verdict against initiator where jury "could have reasonably found that appellant's employees withheld material evidence and failed to make a full and fair disclosure of all relevant facts to the prosecuting authorities"); *Miller v. Pennsylvania R. Co.*, 89 A.2d at 811 (quoting *Byers v. Ward*: "Probable cause does not depend on the state of the case in point of fact but upon the honest and reasonable belief of the party

prosecuting.") (emphasis added); *Simpson v. Montgomery Ward & Co.*, 46 A.2d 674, 678 (Pa. 1946) (requiring honest, reasonable belief of guilt on the part of the person *initiating* the prosecution); *Hubert v. Alta Life Ins. Co.*, 7 A.2d 98, 101 (Pa. Super. Ct. 1939) (where defense to malicious prosecution suit is the following of advice of counsel, defendant "must show . . . that he made a full and fair disclosure of the facts to counsel"); *Biggans v. Hajoca Corp.*, 94 F. Supp. at 598 (same).

It is understandable that when a person initiates a prosecution, her lack of a good faith belief in the accused's guilt and her failure to disclose material information are relevant considerations for determining whether she had probable cause. But, it is another matter where a private individual merely communicates information suggesting guilt to the police. Sometimes a private individual reporting information to the police will not have a well-formed belief in the suspect's guilt, but instead will be aware only of some facts that might point to that suspect. For instance, in reporting a robbery suspect, a witness might not be able to state with certainty that the suspect perpetrated the crime, but might be able to state only that the suspect resembles the perpetrator. Similarly, a witness or victim deliberately might omit reporting certain facts to the police in the belief that these facts are insignificant. Indeed, an informer might report information to the prosecuting authorities indicating that a person may have committed a crime, even though the informer does not believe the suspect to be guilty because of her personal knowledge of the suspect's character.

We think that the Supreme Court of Pennsylvania would hold that the duty falls on the police and the prosecuting authorities, and not on a private individual supplying information, to determine what are the significant facts in an investigation. *Accord Koski v. Vohs*, 358 N.W.2d 620, 627 (Mich. Ct. App. 1984), *rev'd on other grounds*, 395 N.W.2d 226 (Mich. 1986) (holding officer's incident report that did not fully disclose facts to prosecutor did not cause prosecution because prosecutor conducted independent investigation and decided to prosecute based on his own findings). Thus, an informant has neither a duty to consider what information the police reasonably might need to conduct a complete investigation nor a duty to be certain that a suspect is guilty before giving *any* facts that would be helpful to the police.

A requirement that a private party have a duty beyond reporting information inevitably would discourage persons from imparting their suspicions to the police and in some cases effectively would shift the duty of criminal investigation from law enforcement professionals to the private individuals. Furthermore, imposition of such a duty cannot be reconciled with the recognition of the Pennsylvania courts that in balancing the conflicting interests of society in law enforcement on the one hand and the individual in freedom from false accusation on the other, "[c]learly, the interest in preservation of the public order is 'the more important of the conflicting public policies.'" *Kelly v. General Teamsters*, 544 A.2d at 940 (quoting *Miller*, 89 A.2d at 809). Thus, we hold that when a person supplies accurate information to the police, that person, regardless

of her motives and her actions in withholding other information, cannot be regarded as being responsible for the institution of criminal proceedings, so long as the police retain the complete discretion in determining whether to prosecute, and so long as that person does not conceal additional information requested by the police. Therefore, the jury's findings to the special interrogatories on which Griffiths relies, though admittedly disturbing, simply established that the appellants acted with malice and without probable cause. But they did not establish that the appellants were responsible for the institution of the proceedings. Accordingly, we must reverse the judgment on the malicious prosecution claim. Of course, that claim will not be retried on the remand, for the appellants cannot be liable to Griffiths for malicious prosecution.[6]

2. *Retaliatory Discharge Claim*

The appellants next urge that the district court's jury instructions with respect to the retaliatory discharge claim imposed a lesser burden of proof on Griffiths than the controlling law requires.[7] In

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6. The appellants also contend that the district court improperly submitted to the jury the issue of whether there was probable cause. In view of our result, we do not consider this point.

7. With respect to the retaliatory discharge claim, the court instructed the jury:

> If an employee is fired, that is, discharged or terminated by the employer because the employee had filed a charge of employment discrimination, both federal and state law provide that the employee may sue the employer in court for all damages that the employee suffers as a result of the discharge.

particular, the appellants take exception to the court's charge on the grounds that it impermissibly allowed the jury to find them liable if Griffiths proved that retaliation was only one of

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> If, however, he was fired for or discharged or terminated for totally different reasons and in no way to retaliate against him because he had filed charges, then the employer would not be liable.
>
> . . .
>
> Thus, in this case if *a motivating factor*, that is, if *one of the reasons for* terminating Jackey Griffiths as an employee was to get back at him or in response or return for his having filed a charge of employment discrimination against CIGNA, CIGNA will be liable for such damages as resulted from the termination of his employment.
>
> On the other hand, if the fact that Jackey Griffiths had filed a charge of employment discrimination against CIGNA which was then known to CIGNA, *played no part* in the decision of CIGNA to terminate his employment, regardless of whether you think he was otherwise unfairly treated, he would have no cause of action under the evidence presented in this case.
>
> If he would not have been discharged *but for* the fact that he had filed the employment discrimination charges against CIGNA, then retaliation would be *a motivating factor*.
>
> > If he would have been fired in any event or terminated, and the fact that he had filed an employment discrimination charge played no part in bringing about his discharge, CIGNA would not be liable for a retaliatory discharge.
> >
> > . . .
> >
> > Defendants have provided a non-discriminatory valid explanation but plaintiff claims that he has

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If he would not have been discharged *but for* the fact that he had filed the employment discrimination charges against CIGNA, then retaliation would be *a motivating factor*.

If he would have been fired in any event or terminated, and the fact that he had filed an employment discrimination charge played no part in bringing about his discharge, CIGNA would not be liable for a retaliatory discharge.

. . .

Defendants have provided a non-discriminatory valid explanation but plaintiff claims that he has

the reasons for his termination.[8] Thus the court told the jury that CIGNA would be liable if retaliation was "a motivating factor" or "one of the reasons" for Griffiths' discharge. The appellants maintain that in an employment discrimination case the court must charge that the improper motive was the "but for" cause of the adverse employment action, meaning that the discriminatory motive was the *sole* cause or *the* determinative factor.

Section 704(a) of Title VII forbids an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation

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> established by a preponderance of the evidence that the explanations are *a pretext* or a *sham and* that in actuality, *at least one of the motivating factors* was retaliation against him, *even though there may have been other valid reasons.*

JA 197-200 (emphasis added).

8. The appellants objected to the district court's charge on malicious prosecution immediately after it was given, but they did not object to the retaliatory discharge instruction at that time. Rather, they relied on their objection at the charging conference. It would have been better for the appellants to have renewed their objection after the charge was given. However, because the district court acknowledged during oral argument on the appellants post-trial motions that the "contention about the, but for charge, I think that was reasonably well preserved" (Transcript of Oral Argument, May 13, 1992, p. 22), we will consider the appellants' exception to the retaliatory discharge instruction on the merits.

. . . under this subchapter." 42 U.S.C. § 2000e-3(a). Similarly, under section 5(d) of the PHRA it is unlawful "[f]or any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge . . . under this act." Pa. Stat. Ann. tit. 43, § 955(d) (Supp. 1992). Under both statutes, to establish that a discharge was retaliatory, a plaintiff must show that (1) he engaged in a protected activity; (2) he was discharged subsequent to or contemporaneously with such activity; and (3) there is a causal link between the protected activity and the discharge. *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 725 (1990); *Consumers Motor Mart v. Human Relations Comm'n*, 529 A.2d 571, 575 (Pa. Commw. Ct. 1987).[9] To establish that activity is protected under Title VII, a plaintiff need not prove the merits of the underlying discrimination complaint, but only that "he was acting under a good faith, reasonable belief that a violation existed." *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990).

The order and allocation of burdens of proof in retaliation cases follow the standards established for Title VII claims in general. *See Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73 (3d Cir. 1986). However, these standards will vary depending on whether the suit is characterized as

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9. In charging the jury, the court did not distinguish between the federal and state statutes.

being "a pretext" or "mixed motives" case. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246-48, 109 S.Ct. 1775, 1789 (1989); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, Nos. 91-1741, 1780, slip op. at 28 (3d Cir. Dec. 30, 1992); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180-81 (2d Cir.), *cert. denied*, 113 S.Ct. 82 (1992). In pretext cases, the analysis erected by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), and subsequently refined in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), applies, whereas in mixed motives cases the analysis developed in *Price Waterhouse v. Hopkins* applies.

In a pretext case, the employee argues that the employer's facially legitimate reason as stated for the employment decision was false and thus was not the real reason for the decision. "[T]he premise of [a pretext case] is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision." *Price Waterhouse*, 490 U.S. at 247, 109 S.Ct. at 1789; *see also Ezold*, slip op. at 29; *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 49 n.7 (3d Cir. 1989)(noting issue in pretext case is "'whether illegal or legal motives, but not both, were the 'true' motives behind the decision'" (quoting *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 n.5, 103 S.Ct. 2469, 2473 n.5 (1983)); *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200, 202 (3d Cir. 1987) (holding that to prevail in a pretext suit, the plaintiff must "prove by a preponderance of the evidence that the proffered reasons were not the employer's true reasons"), *cert. denied*, 484 U.S. 1019, 108 S.Ct. 730 (1988). In contrast, a mixed motives case involves proof that the adverse

employment decision resulted from a mixture of legitimate reasons and prohibited discriminatory motives. In such a case, the plaintiff does not argue that the legitimate motives articulated by the employer did not motivate the employment decision. Rather the plaintiff contends that additional, improper motives played a role in causing that decision. *Price Waterhouse*, 490 U.S. at 241-45, 109 S.Ct. at 1786-88.

In both pretext and mixed motive cases, the plaintiff has the initial burden to establish a *prima facie* case of employment discrimination. In a pretext case, once a plaintiff makes the *prima facie* case, the burden of going forward shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse employment decision. *Burdine*, 450 U.S. at 252-55, 101 S.Ct. at 1093; *Ezold*, slip op. at 30; *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986), *abrogated on other grounds*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775. If the defendant articulates, through admissible evidence, a legitimate non-discriminatory reason for the discharge, any presumption of discrimination drops from the case, and the plaintiff then must satisfy the ultimate burden of proving discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095; *Ezold*, slip op. at 30; *Bellissimo*, 764 F.2d at 179.[10] Thus, in a pretext case the defendant,

10. PHRA Pretext cases are considered under the same analysis as cases under Title VII. *See Allegheny Housing Rehabilitation Corp. v. Human Relations Comm'n*, 532 A.2d 315, 318-19 (Pa. 1987).

rather than attempting to prove an affirmative defense, supplies an explanation.

By contrast, in a mixed motive case if the plaintiff meets his initial burden to establish a *prima facie* case of employment discrimination, the defendant may avoid liability by establishing an affirmative defense. Therefore if a plaintiff in a mixed motives Title VII case establishes a *prima facie* case that the discriminatory motive was a "motivating" or a "significant" factor in the employment decision, the defendant may avoid liability by proving that it would have made the same decision even if the forbidden consideration had played no role in the employment determination. *Price Waterhouse*, 109 S.Ct. at 1787-88; *Ezold*, slip op. at 28-29; *Lockhart*, 879 F.2d at 49 n.7.[11]

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11. Following the enactment of the Civil Rights Act of 1991, Title VII provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C.A. § 2000e-2(m), as added by the Civil Rights Act of 1991, section 107(a). The 1991 Act partially overruled *Price Waterhouse* by providing that even if an employer demonstrates that it would have made the same decision absent a discriminatory motive, the plaintiff continues to be eligible for declaratory and injunctive relief and for attorney's fees and costs. 42 U.S.C.A. 2000e-5(g)(2)(B), as amended by the Civil Rights Act of 1991, section 107(b). *See also Robinson v. Southeastern Pennsylvania Trans. Auth.*, 982 F.2d 892, 899 n.8 (3d Cir. 1993). As the parties have not argued that this new provision applies retroactively in this case, we will analyze this case under the rules established in *Price Waterhouse* without regard for the 1991 Act.

Mixed motives and pretext cases also differ in what the respective plaintiffs must show to shift a burden to the defendant. It is clear that a pretext plaintiff does not face an onerous hurdle in establishing a *prima facie* case as he may rely on either circumstantial evidence, *Burdine*, 411 U.S. at 253-54, 101 S.Ct. at 1094, or on direct evidence of discrimination. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621-22 (1985); *see also Billet v. Cigna Corp.*, 940 F.2d 812, 816 (3d Cir. 1991).[12] However, in *Ezold* we recognized that "[t]here is some uncertainty in the law about the sort of evidence a plaintiff must show" to establish a *prima facie* mixed motives case, *Ezold*, slip op. at 29 (citing *Tyler*, 958 F.2d at 1183) and thereby shift the burden of proof to the employer. At least some of the courts which have allowed a plaintiff to establish a mixed motives case through circumstantial evidence recognize that such evidence must be different in kind from the circumstantial evidence supplied under the *McDonnell/Burdine* shifting burden analysis. For example, in *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992), the court stated that the circumstantial evidence

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12. If a plaintiff in a pretext case relies on direct evidence of discrimination, the *McDonnell Douglas/Burdine* shifting burdens analysis is inapplicable. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 121, 105 S.Ct. at 621-22; *see also Billet v. Cigna Corp.*, 940 F.2d at 816. But except in cases concerning the legitimacy of employment practices acknowledged to be the basis for the adverse employment decision, when a plaintiff has direct evidence of discrimination, the case is likely to be a mixed motives case for the employer will offer a different but legitimate basis for the adverse employment decision.

"must be tied directly to the alleged discriminatory animus." Thus,

> purely statistical evidence would not warrant [shifting the burden]; nor would evidence merely of the plaintiff's qualification for and the availability of a given position; nor would 'stray' remarks in the workingplace by persons who are not involved in the pertinent decisionmaking.

Id. Instead, the *Ostrowski* court suggested that a plaintiff could shift the burden to the defendant through such evidence as "policy documents or statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus of the type complained of in the suit." *Id. See also Kirschner v. Office of the Comptroller*, 973 F.2d at 93 (circumstantial evidence sufficient if "tied directly to" discriminatory animus).

We agree with the court in *Ostrowski* that at the very least "[n]ot all evidence that is probative of discrimination will entitle the plaintiff to [shift the burden]" to the defendant under *Price Waterhouse*. 968 F.2d at 181. At a bare minimum, a plaintiff seeking to advance a mixed motive case will have to adduce circumstantial evidence "of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." *Id.* at 182. If "that evidence is sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision, the jury should be instructed that if it does draw that inference the plaintiff is entitled to recover unless the employer has established by a preponderance of the

evidence that the employer would have taken the same action without consideration of the impermissible factor." *Id.* We need not address in further detail what sort of circumstantial evidence must be presented, as we are satisfied, for the reasons we explain below, that Griffiths has failed to submit any evidence that can fairly be said to "directly reflect" the alleged retaliatory motive for his termination by the appellants.[13]

We must consider within the foregoing framework the appellants' contention that the district court erred in instructing the jury that retaliation only need have played a motivating role in the decision to terminate Griffiths. Prior to *Price Waterhouse*, there was some inconsistency within this circuit as to the level of causation a plaintiff must demonstrate to prevail on claims of employment discrimination. We have on occasion used the phrase "but for" not only to suggest that a plaintiff must show a causal nexus between the discriminatory motive and the employment action, but also to describe the level of causation required. But a close reading of our cases demonstrates that we have not used the "but for" terminology consistently. In *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892, 105 S.Ct. 266 (1984), the case upon which the appellants primarily rely, we rejected the plaintiff's contention that she had to prove that race was only a "motivating" factor or a

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13. Should a plaintiff intending to advance a mixed motives case fail to show discrimination at the outset, the case then falls under the *Burdine* pretext standard. *Price Waterhouse*, 490 U.S. at 247 n.12, 109 S.Ct. at 1789 n.12.

"substantial" factor for the defendant-employer's refusal to promote her. Rather, we required proof of "but for" causation in the sense that race played "the determinative" factor in the employment decision. 725 F.2d at 915-19. Although we never expressly have overruled *Lewis*, in *Bellissimo*, 764 F.2d at 179 n.1, we seemed to contradict *Lewis* by stating:

> The 'but for' test does not require a plaintiff to prove that the discriminatory reason was *the* determinative factor, but only that it was *a* determinative factor. *See Smithers v. Ballar*, 629 F.2d 892, 898 (3d Cir. 1980) ('a plaintiff need not prove that [the discriminatory reason] was the employer's sole or exclusive consideration, but . . . he must prove that [the discriminatory reason] made a difference in deciding the promotion, retention, or discharge'). Interpreting Title VII to require proof of 'the determinative factor' is inconsistent with the 'but for' causation test, insofar as plaintiff would be required to show that the discriminatory motive was the *sole* reason for the action taken. More than one 'but for' cause can contribute to an employment decision, and if any one of those determinative factors is discriminatory, Title VII has been violated. *See Lewis v. University of Pittsburgh*, 725 F.2d at 917 n.8.

However, in *Roebuck v. Drexel University*, 852 F.2d 715, 726 (3d Cir. 1988), we reiterated the "but for" language by reference to *Lewis*. Yet, in *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 764 (3d Cir. 1989), we stated that a plaintiff-employee in an ADEA case has the burden of persuading the fact finder whether age was "*a* determinative

factor." *See also Billet v. Cigna Corp.*, 940 F.2d at 816 (using "a determinative factor"); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 373 (3d Cir. 1987)(same); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987) (in banc) (stating plaintiff in ADEA case "need not prove that age was the employer's sole or exclusive consideration, but must prove that age made a difference in the decision").

The Supreme Court has now clarified the issue. After *Price Waterhouse*, it is clear in mixed motives cases that the plaintiff need not prove that the discriminatory motive was the sole consideration which led to an adverse employment decision, but only that the discriminatory motive made a difference in that decision. Accordingly, in a mixed motives case a correct jury charge on causation may employ such phrases as "a motivating factor," "a significant factor" or "a determining factor" in describing the role the discriminatory motive plays.[14]

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14. To our knowledge, no Pennsylvania court has considered whether "a motivating factor" or "a significant factor" level of causation would suffice under the PHRA. However, in *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990), the court applied the "motivating" factor causation of *Price Waterhouse* and the reformulated "but for" test of *Bellissimo* to the PHRA. *Id.* at 685 ("In this case, because the plaintiff showed that his non-job related handicap was the dispositive, or but-for, cause of his termination, *the proof goes far beyond that which is necessary*." (citing *Bellissimo*)(emphasis added)). As the Pennsylvania Supreme Court has "frequently employed federal case law in its construction of the PHRA," *Garvey v. Dickinson College*, 775 F. Supp. 788, 800 n.7 (M.D. Pa. 1991), we accept the *Cain* court's application of *Price Waterhouse* under the PHRA.

However, the plurality in *Price Waterhouse* specifically noted that the analysis in pretext cases remains unchanged. *Price Waterhouse*, 490 U.S. at 245, 109 S.Ct. at 1788. Thus, while we recognize that in our pretext cases we have stated in passing, without focusing on the matter, that the discriminatory motive need not be the sole factor causing the employment decision, *see, e.g., Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992); *Bruno*, 882 F.2d at 764; *Chipollini*, 814 F.2d at 897, it is clear that in pretext cases *the claim is that* the discriminatory motive was the sole cause of the employment action and therefore it is inappropriate to state that the plaintiff only need show that the discrimination played "a motivating" or "a substantial" role.

Inasmuch as the characterization of a discrimination case obviously affects the allocation of proof, "[a]t some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives." *Price Waterhouse*, 490 U.S. at 247 n.12, 109 S.Ct. at 1789 n.12. A court will categorize a case as mixed motives where the plaintiff can "satisfy the fact finder that it is more likely than not that a forbidden characteristic played a part in the employment decision." *Id.* It is evident from the jury charge in this case, that the district court did not make such a determination. Instead, the court simply combined a mixed motive charge with a pretext charge. For example, the court told the jury that it could consider the employer's explanations as "*a pretext* or a *sham and* that in actuality, *at least one of the motivating factors* was retaliation against him, *even though there may*

have been other valid reasons" for the termination.[15] (Emphasis added.)

We are satisfied from the record, however, that this is a pretext case, as the only evidence of retaliation that Griffiths offered were the inferences drawn from the fact that the appellants terminated him shortly after he filed the EEOC charge. This sort of evidence falls in the same category as the types of evidence that the court in *Ostrowski* described as insufficient to demonstrate a *prima facie* mixed motives case– *i.e.* purely statistical evidence or evidence of the plaintiff's qualifications or evidence of "stray" remarks in the workplace by persons not involved in the employment decisionmaking. Thus, although the evidence submitted by Griffiths might satisfy the requirements for making a *prima facie* retaliatory discharge case generally, it does not meet the test, under any possible standard, for establishing a mixed motives case. As this case properly is characterized as a pretext case, the court should not have charged the jury that retaliation could be only "a motivating factor" or "one of the reasons" for Griffiths' discharge.

Moreover, even if we could categorize this case as a mixed motives case, the court still gave an incorrect charge by neglecting to tell the jury of the appellants' affirmative defense that they would have discharged Griffiths quite aside from any motive to retaliate against him. While the court did instruct the jury that the appellants would not be liable if they terminated Griffiths for reasons

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15. It is only fair to acknowledge that the district court may have been misled by the lack of precision in our opinions to which we already have alluded.

other than to retaliate against him, this instruction was given in the context of an instruction which effectively required the jury to consider Griffiths' and the appellants' contentions as mutually exclusive, for the instruction related to the pretext issue rather than to an affirmative defense. Accordingly, the charge did not advise the jury that the appellants' lawful motivation could be a defense even if the appellants also were motivated unlawfully. Clearly appellants were prejudiced by this charge, and we will therefore reverse the judgment of the district court and remand for a new trial on the retaliation claims, as a pretext case, under federal and state law.

IV. *Conclusion*

In view of our conclusions, we will reverse the order of May 14, 1992, and will remand the case to the district court for entry of judgment in favor of the appellants on the malicious prosecution claim and for the holding of a new trial on the retaliation claims.

SEITZ, *Circuit Judge*, concurring and dissenting.

I join in the opinion of the court granting a new trial on plaintiff's retaliatory discharge claim.

I dissent from the disposition of the malicious prosecution claim by the majority because I disagree with its prophecy as to the controlling principle of Pennsylvania law. In *Kelley v. General Teamsters, Chauffeurs, and Helpers, Local Union 249*, 544 A.2d 940 (Pa. 1988), the court stated the requirements of such an action:

> A cause of action for malicious prosecution has three elements. The defendant must have instituted proceedings against the plaintiff 1) without probable cause, 2) with malice, and 3) the proceedings must have terminated in favor of the plaintiff.

Id. at 941 (citing *Miller v. Pennsylvania R.R. Co.*, 89 A.2d 809, 811 (Pa. 1952)).

The initial requirement is that plaintiff show that the defendant instituted the proceedings against the plaintiff. The majority concludes that plaintiff failed to make this showing. I do not agree.

The Pennsylvania courts have adopted the Restatement (Second) of Torts § 653 in formulating their law of malicious prosecution. *Neczypor v. Jacobs*, 169 A.2d 528 (Pa. 1961). Under that section a defendant who did not formally commence the proceedings may, nevertheless, be held to have initiated the proceedings under certain circumstances. I turn to that issue.

One of the ways a plaintiff may be held to have initiated such proceedings is to show "that the information furnished by him upon which the official acted was known to be false." Restatement (Second) of Torts § 653 cmt. g (1977). This limitation on the general non-liability rule flows from the reasonable premise that a public official who is provided false information is unable intelligently to exercise his or her discretion to decide whether to prosecute. It follows, in my view, that if it can reasonably be found that material information is deliberately withheld by a private individual when he or she provides information about possible criminal activity of an identified individual, such action amounts to knowingly

supplying false information. In such a case that individual is responsible for having initiated the proceedings and thus fulfills that required element of a malicious prosecution action.

While the Pennsylvania courts have apparently not yet addressed the position I take here, I predict that the Supreme Court of Pennsylvania would adopt it. I reach this conclusion first because of the inherent logic of such a reading of the general rule. Truth can be distorted as readily by omission as by commission. Second, several other state courts have recognized such an interpretation of Section 653. Thus, in *Hirth v. Hall*, 627 P.2d 1257, 1259 (N.M. Ct. App. 1981), the court relied on the Restatement in vacating an order granting summary judgment on a malicious prosecution claim where there was a genuine issue of material fact as to whether "defendant furnished false information by not disclosing . . . several relevant aspects of the dispute . . . ."

Similar support for the same legal proposition is found in *Rose v. Whitbeck*, 562 P.2d 188, 191, *reh'g denied and opinion modified*, 564 P.2d 671 (Or. 1977), where in discussing the Restatement, the court stated that "[t]his rule contains the limitation that the defendant . . . did not withhold information . . . . " Additionally, in *Gustafson v. Payless Drug Stores Northwest, Inc.*, 525 P.2d 118, 123-24 (Or. 1974), in discussing the Restatement, the court stated that "[t]he same rule applies if the private person knowingly fails to furnish information which the jury could find the private person knew was material to action by the official." This interpretation of the general rule was also recognized in *Thomas v. Cisneros*, 596 S.W.2d 313, 316-17 (Tex. Civ. App. 1980)(affirming a judgment

for defendant after finding that *full* and fair disclosure was made, relying on the Restatement as stating the reasoning behind this requirement).

In reaching its conclusion, the majority states that "when a person supplies accurate information to the police, that person, regardless of her motives and her actions in withholding other information, cannot be regarded as being responsible for the institution of criminal proceedings . . . *so long as that person does not conceal additional information requested by the police*." Majority Opinion at [typescript at 20] (emphasis added). I cannot agree that this is a correct prediction of Pennsylvania law in the present circumstances. I reiterate my belief that the Supreme Court of Pennsylvania would conclude that knowingly withholding material information when communicating to a public official another's supposed criminal misconduct, of which the official is ignorant, amounts to knowingly providing false information within the intent of the language of the Restatement.

From my prospective the limitation on Pennsylvania law imposed by the majority — concealment of additional information requested by police — suffers from at least two important infirmities in the present context. First, it severely dilutes the importance of a person's obligation not to deliberately cause his or her allegation to be viewed by the police in a false light. After all, triggering an official criminal inquiry toward a particular individual has important traumatic consequences for that person. Second, the limitation imposed by the majority is dependent on the happenstance that the individual initiating the communication is asked the "right" questions by

the police. I fully appreciate the importance of the law enforcement considerations noted by the majority, as well as the jaundiced judicial view of this type of action. Nevertheless, I believe Pennsylvania law provides a legal remedy for citizens victimized by the type of calumny alleged here.

I turn now to the evidence to determine whether it was sufficient to create a jury issue as to whether material information was deliberately withheld by defendant's agent in her report to the police.

As noted in the majority opinion, the record shows that many computers were stolen from the offices of the defendant during 1989 and 1990. On March 21, 1990, after the thefts which had occurred in the preceding week, Graham, defendant's director of security, gave a three page letter to the Philadelphia Police Department. She stated that "[i]nformation gathered concerning the latest thefts suggests that Assistant Supervisor Jackey Griffiths [plaintiff] working in connection with a former CIGNA security officer Tony Bolton may be responsible for some if not all of the computer thefts."

Graham's report to the police did not mention that, to her knowledge, other employees had unsupervised access to the locked areas where the stolen computers were located; that other employees had access to master keys that unlocked secured areas where computers were kept; and that she had suspected another identified supervisor of having been involved in computer thefts over the previous several months.

I believe the evidence clearly was sufficient to create a jury issue as to whether defendant, through its agent, can be held responsible for initiating the proceedings. The same is true of Graham's motivation in sending the report.

It is not amiss to note that the police detective who received the report testified that he would have conducted additional investigations before seeking an arrest warrant had he known of the foregoing undisclosed information.

I next consider the other elements of a malicious prosecution action. Plaintiff must show that the proceedings were initiated without probable cause.[1] The withheld information that I have identified was evidence of the absence of probable cause. Furthermore, and of crucial significance is the following concession in defendant's reply brief:

> CIGNA does not argue on this appeal that the evidence did not support the jury's findings and CIGNA's argument concerning probable cause relates only to how the court utilized the jury in deciding the issue.

I am satisfied that there was sufficient evidence for a lack of probable cause finding to be made here.

Despite my conclusion that plaintiff's evidence was sufficient to entitle plaintiff to go to trial on the malicious prosecution claim, I believe that the pertinent instructions and interrogatories at the

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1. "Probable cause has been defined as a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation in believing that the party is guilty of the offense." *Miller v. Pennsylvania R. Co.*, 89 A.2d 809, 811-12 (Pa. 1952) (quoting *Altman v. Standard Refrigerator Co.*, 173 A. 411, 417 (Pa. 1934)).

trial contained legal errors. First, the instruction that defendant had a duty of reasonable investigation before sending the report to the police is contrary to Pennsylvania law and the Restatement. Consequently, the district court placed an unwarranted burden on defendant that could well have improperly influenced the jury.

Second, regardless of the district court's post-trial ruling finding that there was a lack of probable cause, I believe the interrogatories and instructions directed to this issue by the district court erroneously permitted the jury to decide the lack of probable cause issue.

Both parties rely on our decision in *Thomas v. E.J. Korvette, Inc.*, 476 F.2d 471, 475-76 (3d Cir. 1973), as establishing that under Pennsylvania law, where the jury might confuse the issue of guilt and innocence with lack of probable cause, the court must determine the issue of probable cause based on factual findings made by the jury.[2] Thus, it was for the jury to make the relevant factual findings and then for the district court, based thereon, to decide whether the requisite absence of probable cause was shown. In consequence, the district court's submission of that determination to the jury was error under *Thomas*.

The next requirement of plaintiff's claim is to show malice. If probable cause is absent, malice

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2. Given that the parties agree that *Thomas* states the controlling principle, I do not address the question of whether or not *Thomas* is still a correct expression of Pennsylvania law. *See Kelley*, 544 A.2d at 941 ("Usually the existence of probable cause is a question of law for the court rather than a jury question, but may be submitted to the jury when facts material to the issue of probable cause are in controversy.").

may be inferred, presumably by the jury.[3] *See Kelley*, 544 A.2d at 941. Other evidence relevant to this issue would also be considered in a retrial. Thus, for me, resolution of the malice issue would be for the fact finder. The final element of plaintiff's claim is satisfied here because it is undisputed that the proceedings terminated in plaintiff's favor.

The majority reverses the judgment for plaintiff on the malicious prosecution claim and directs the entry of judgment for the defendant. I believe the trial errors only entitle defendant to a new trial rather than the entry of judgment in its favor. I say this because the plaintiff fulfilled the evidentiary requirements to be entitled to go to trial on his claim. Thus, I dissent.

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3. It is not clear to me how such an instruction would operate as to this issue if the probable cause determination is made by the court *after* the fact finder determines the underlying facts.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1413

JACKEY B. GRIFFITHS

v.

CIGNA CORPORATION,
MARLENE GRAHAM, Individually
and in her own official
capacity as head of Security
with CIGNA CORP.

CIGNA Corporation and Marlene Graham,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 91-2356)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and SEITZ, Circuit Judges

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The petition for rehearing filed by the appellee in the above captioned matter having been submitted to the judges who

participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ Morton A. Greenberg
Circuit Judge

Dated: April 14, 1993